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MEMORIAL

ROBERT JOSEPH FARLEY: A MEMORIAL
Jerome Fontaine Leavell

ARTICLE

THE *THORNBURGH* AND *BOWERS* CASES: CONSEQUENCES FOR *ROE V. WADE*
James J. Knicely

COMMENTS

GENERAL, SPECIAL, LOCAL AND PRIVATE LEGISLATION: A MISSISSIPPI OVERVIEW

REEXAMINATION OF THE ROBISON TEST FOR SEAMAN STATUS

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DEAN ROBERT JOSEPH FARLEY: A MEMORIAL

*Jerome Fontaine Leavell**

Introduction

We have all heard the adage that they "threw away the mold when they made him." The inventor of this expression may have had in mind such a rare person as Robert Joseph Farley. It is not surprising then that an old family legend relates that on that early December night when he was born the sky over Hernando seemed strangely bright, perhaps, so said the witnesses, to signal "some special event." Whether this is a fanciful fable or colorful coincidence, time seems to have shown that the birth of this man was truly exceptional and resulted in the emergence of a uniquely great person. He was, as will be shown, destined to demonstrate an enormous versatility as scholar, teacher, administrator, professional leader, and public servant. The purpose of this writing then is to tell some of the salient facts about this extraordinary man: his personality, character, accomplishments and courage, as well as to describe the highlights of his extensive and exciting career.

Bob, as he was affectionately called, died in Oxford on August 23, 1985, at the age of 86, having devoted most of his years to the study, practice, and teaching of the law. He was for many years the overriding legal figure in Mississippi and one of the giants of the American legal teaching profession. In Mississippi he was the admired, revered, and beloved teacher of those who

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* B.A., LL.B. (1951) University of Mississippi; LL.M. (1964), J.S.D. (1972) Yale University (Sterling Fellow); University of Oxford (Balliol College - 1969), Ford Foundation Fellow and Member; Assistant to the Tutor in Jurisprudence; Law Clerk, United States Court of Appeals, 5th Circuit (Holmes) 1952-53; Law professor at University of Arkansas, L.S.U., Marshall Wythe School of Law, College of William & Mary, and Mississippi College; Associate with Cadwalader, Wickersham, and Taft, New York; Attorney with legal departments of the Chase Manhattan Bank (New York City) and Merrill, Lynch, Pierce, Fenner and Smith (New York City).

tried the law in the courts or drafted it in the legislature or conference rooms. He was the humane and benevolent gentleman and patron whose pervasive personal influence reached into every law office and courthouse. He was the paragon of the consummate teacher, precise craftsman, distinguished scholar, architect of law, and dedicated public servant. In short, he was a "Prince of Lawyers".

Therefore, it is most appropriate and deserving that we honor him with this special tribute in the *Mississippi Law Journal*, to the advancement of which he himself, contributed so much. Being a nephew, a former student, and a lifetime admirer of Bob Farley, your kind indulgence is asked should the author go astray in attempting here the task of describing his career and capturing the essence of his character and personality.

The Man

It is indeed regrettable that Bob never paused long enough during his vigorous and exciting life to write an autobiography. It would have been very helpful in trying to delineate his personality and character. We would know with more certainty and confidence the most significant details of his boyhood and his maturation; his innermost thoughts, feelings, and beliefs during his various experiences; his motivating goals and incentives; as well as having a first-hand description of the stirring times and events through which he passed and in which he played such an important role.[1]

Denied this best source, the author is compelled to rely on a lifetime's observations and memories, as well as those of some of Bob's contemporaries, for this profile. We know that he attributed his early moral and mental development to his father, Judge Leonard Jerome Farley (1859-1921), who was dean of the Ole Miss Law School from 1913 to 1921;[2] and to his mother, Lil-

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[1] "There is no description so hard, nor so profitable, as is the description of a man's own life" — Montaigne.

[2] "[Robert Farley] was of pioneer Mississippi stock; his paternal grandfather had been in the class of 1854, and both of his grandfathers were killed in action [in the Confederate Army] in the Civil War; his father was a former dean of the Law School." J. Silver, Mississippi, The Closed Society 113 (1964); *see also* Cleghorn, *A Dean Departs From Ole Miss*, Rep. Mag., Oct. 24, 1963, at 42 (brief description of Dean Farley's family

ian David Lauderdale (1862-1923), a woman of literary refinement and cultivation. He never had the opportunity to know either of his grandfathers as both were killed in battle fighting for the Confederacy.[3] His precocity was evident early and he showed great promise. At a very young age he exhibited his intellectual gifts and aptitudes, as well as a capacity to complete whatever task he undertook. His mind was early habituated to self-dependence and fortitude. According to accounts of his family, he "matured" early. His emotions were finely balanced and controlled, though his anger could be provoked by people whom he thought to be dishonorable or malicious.

By nature, he was generous, jovial, cheerful and fun-loving, though equally serious-minded whenever the occasion required. In fact, there seemed to be two somewhat distinct and balanced sides to his personality, the contemplative-introspective and the gregarious-extroverted. He could be as firm and non-yielding in regard to matters of principle as he could be jocose, playful and carefree in the company of his friends and guests. He genuinely enjoyed human companionship. One of his endearing qualities was that he was a patient listener as well as a winsome speaker.

Though his countenance was open and cheerful and his nature gentle, he invariably commanded respect. His demeanor

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history and his life).

> Dean Farley, a 1919 A.B. and 1924 law graduate of Ole Miss, was the third generation Farley to graduate from the University. His grandfather, Dr. Robert Farley, graduated in 1854, and his father, Leonard J. Farley, one of the original LaBauve Scholars, graduated in 1884. Leonard J. Farley came to Ole Miss in 1910 to teach law, and served as dean of the law school from 1913-1921. Seven sons and daughters of Leonard J. Farley graduated from Ole Miss.

Dean Farley Quits, Morse is Successor, Clarion-Ledger, June 21, 1963, at 9, col. 1 [hereinafter *Dean Farley Quits*].

The seven children of Dean & Mrs. Leonard Jerome Farley who graduated from the University were: Leonard Eugene Farley (1908 - B.A., 1910 - LL.B. Rhodes Scholar); Dr. David LaBauve Farley (1911 - B.S. and pre-medical certificate to University of Pennsylvania Medical School (M.D.)); Lillian Grace Farley (Leavell)(1913 - B.A., 1944 - M.A.); Nancy Eliza Farley (1915 - B.A., 1919 - M.A.); Helen Christine Farley (McElroy)(B.A. - 1918); Dr. Robert Joseph Farley (B.A. - 1919, LL.B. - 1924); Alice May Farley (O'Brien)(B.A. - 1922).

[3] "Few men have had two grandfathers killed in the War Between the States and even fewer, if any, have had a University building named for the family because the father and son each had served as Dean of Law." *Dr. Robert J. Farley recalls Idyllic Oxford-University Community*, Oxford Eagle, Sept. 1, 1983, at 8, col. 1.

was at the same time dignified and relaxed, in the right proportions. The force of his personality seemed to lie lightly below the surface, as if it rested quietly on a coiled spring. His emotional outlook was invariably positive and optimistic, and his glowing grin, his hearty laugh, and characteristic chuckle were delightfully contagious. He was comfortable with nature and at home in the trackless forests and canebrake swamps which then existed in north Mississippi. He especially loved to roam the wild bottoms and quicksand backwaters of the Tallahatchie River (before its taming by the Army Engineers in constructing the Sardis Reservoir) in search of game with knife and gun. Bear, turkey, wildcat, razorback boar, wolf, and black and red (Coahoma) panther apparently still inhabited the area at that time. As he was a true "woodsman", he also took delight in the simpler pleasures of camping, picnicking and cooking on an open fire. Frequently, he sought the solitude of the forest for contemplation and mental refreshment.

As Bob gradually matured into manhood people recognized in him an unusual wisdom, sagacity and stability, well beyond his years. These attributes, plus his "common sense, sense of duty, and honesty marked him out as a special sort of person." Similarly, before he had reached college age, his gregarious and friendly nature had become one of his trademarks. His own personal warmth and sincerity were radiative, and his wit could be either droll or sharp. His small vocabulary of epithets, used occasionally and carefully for emphasis and always with propriety, was inoffensively mild and somewhat old-fashioned by comparison with today's common "outhouse obscenities."

Bob's keenly perceptive mind and innate understanding of human nature seemed to act as an antenna in picking up the subtlest nuances of people's personalities. With these aptitudes, along with a prodigious memory for detail, he developed into a raconteur[4] with few equals. This was helped by his gift for the gleaning of humor and pathos from a seemingly ordinary, prosaic situation. Being a perpetual student of people, their com-

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[4] Bob never lost his sense of humor, which may have been his "gyroscope" during his most troubled times. Sometimes it would engage critically serious subjects to illustrate or make a point.

plexities, contradictions, strengths and weaknesses, many of his acquaintances became the subjects of his reservoir of anecdotes and stories from which he could draw for any occasion. A mark of the man was the way he could laugh at himself over some awkward, comical or embarrassing situation in which he was a participant.[5] While people naturally gravitated to him, he never courted wealth or power. All of these attractive qualities won him friends and admirers wherever he went.[6] A now deceased Oxford lawyer who was a lifetime friend of both Bob and the author, once remarked that "few people who have known Bob didn't like him".[7]

Perhaps it should also be noted here that while he was never a cynic, he was a complete realist in his interpersonal relations and appraisal of other people. His quiet scrutiny could apparently unerringly detect the dishonorable motive, the dishonest goal, and the false flattery of the deceiver. He was offended by pretense, affectation, hypocrisy, sham, glitter and pomp. His instinct for "good people", a phrase he used in describing people of good will and decency (people he believed to be essentially honorable or capable of transformation, a continuing charitable belief in the potential for reformation in the misguided or uninformed), was usually accurate. Perhaps his powers of observation and instinct also combined when he made such a felicitious choice in proposing marriage to a campus beauty and "Miss Ole

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[5] "[H]e was often in demand as a speaker to legal associations throughout the country. In the Mississippi tradition, Bob was a fine storyteller, not technically but, as observed by David Cohn, simply because he seemed to enjoy himself extravagantly." J. SILVER, RUNNING SCARED: SILVER IN MISSISSIPPI 95 (1984).

[6]

> Bob was an exuberant fellow, the only person I have ever known who might be patted on the back by a victim he had just called a son-of-a-bitch. Bob and Alice moved into the university housing across the gully from Faculty 6. [Jim Silver's home]. Shortly thereafter, Bob's hunting dog killed one of my chickens. Feeling abused, I phoned him and at once he asked that I meet him between the two houses. He appeared with his dog and a baseball bat. Handing it to me he said, "Here, take this and kill the damned dog." Of course I couldn't do it, and Farley and Silver became fast friends.

Id. at 93, 95.

[7] Bramlett Roberts, Oxford attorney and part-time instructor at the Ole Miss Law School for many years.

Miss", Alice Lockard.[8] Married on September 7, 1928, this lovely, gracious and devoted companion proved to be the perfect feminine compliment to his personality for the remainder of his life.

Undoubtedly, those who had the privilege of knowing Bob for any extended period of time found that he always went where his conscience and convictions led.[9]

SCHOLAR

As already stated, Bob's exceptional intelligence manifested itself early. During his years as a student at Ole Miss he received numerous honors and recognitions for his scholastic ability. He was Editor-in-Chief of the Ole Miss Yearbook during his senior year (1919), and he was a member of the Scribbler's Club and the Anniversarian (president) of the Hermaean Literary Society. Following his graduation in 1919 with a B.A. degree, he served for two years as high school principal at Canton and Natchez for the evident purpose of financing his future legal education. Returning to the Ole Miss Law School to prepare for his legal career, he was awarded his LL.B. degree in 1925. After serving as Mayor of Oxford and some years of law practice and part-time teaching at Ole Miss, his special mental endowments came to the attention of the Yale Law School faculty, which selected him, in 1931, for a Sterling Fellowship, inviting him to study there for a post-graduate degree.

Bob's ratiocinative powers were readily recognized and ap-

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[8] *See* Cleghorn, *supra* note 2, at 42.

[9] Even as early as 1930, Bob's refusal to abandon his principles in the face of danger was evident from an incident during his law practice in Oxford. On December 13 of that year he wrote to a sister:

> I have been right busy in the courts this fall but nobody has any money to pay you. After a case in federal court last week in which I defended a Negro charged with selling whiskey, three prohibition officers who took exceptions to some of my remarks to the jury, waited for me after court and, as Hubert Lipscomb might say, attempted to crawl on my powerful frame. I came out of the battle unscathed and unscarred except for getting my hat knocked off, my head staying put as it were. However, if the Oxford police force, consisting of the two Messrs. Jones, hadn't got there when they did, I think I would have gotten my profile ruined.

Letter from Robert J. Farley to Nancy Farley (Dec. 13, 1930).

preciated by his Yale professors. He had come there with a highly organized and vigorous mind, equipped to think lucidly, methodically, and in integral patterns, as well as to articulate his thoughts with equal facility. From all reports, he could organize his work to gain maximum accomplishment in a minimum of time. He apparently possessed a cognitive capacity for highly refined distinctions and comparisons, the mark of the analytical and syllogistic mind. He could handle progressively complex conceptions and problems. His factual recall ability was always acknowledged to be prodigious.

Bob attended Yale at a time when "the great revolution of American law" was entering its most intense period, the end of which is not yet in sight.[10] The very foundations of American jurisprudence were being shaken to their roots. Though the Yale law faculty then consisted of such celebrated legal stalwarts as Arthur L. Corbin, George H. Dession, Asbel G. Guliver, Walter H. Hamilton, Ernest G. Lorenzen, Henry Shulman, Roscoe T. Steffen, Wesley Sturges, and Jerome Frank, the core of the "revolutionists" there was comprised of its celebrated dean, Charles E. Clark (later United States Judge), Underhill Moore, Thurmond Arnold (later United States Attorney General), and William O. Douglas (later Supreme Court Justice).

Legal realism (or "sociological jurisprudence") called for a thorough "fact search of law", as opposed to the traditional "doctrinal approach"—the former often referred to today as "empirical legal research." All of this resulted in a heated controversy as to proper corrective procedures and curriculum modifications. Professors Arnold, Douglas, Moore, and Dean Clark vigorously carried the banners against dogmatic juristic action and in favor of factual research and were thus labeled the "extremist wing of American legal realism."[11] Their theme was that

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[10] "In 1931 he went to Yale as a Sterling Fellow, earning both a doctorate in jurisprudence and the respect of such eminent professors as Thurman Arnold, who remembers his keenness of intellect." *A Dean Departs*, *supra* note 2, at 42.

[11] Myers S. McDougal, Sterling Professor of Law at Yale University from 1934, and Harold D. Lasswell, Professor of Sociological Law at Yale from 1938, collaborated for many years in developing a new systematic approach to the understanding and description of law in action, extending far beyond the "legal realists" by applying advanced sociological and psychological techniques to law study. The impact of their work, like

the courts ought always to be furnished with accurate and relevant sociological data, as it was essential to any rational legal decision.[12]

While at Yale, Bob distinguished himself by completing his doctoral dissertation in only one year (as compared to the usual three or more) and was awarded his J.S.D. degree (Doctor of the Science of Jurisprudence) in 1932. In addition to his dissertation, he had published during his career a number of legal articles, book reviews, lectures, speeches, and other works, as well as co-authoring MISSISSIPPI ANNOTATIONS, RESTATEMENT OF THE LAW OF TORTS (1937), and LOUISIANA ANNOTATIONS, RESTATEMENT OF THE LAW OF TORTS (1941), both for the American Law Institute.

Although Bob had a talent for the colorful phrase, his writing style (excepting some of his written speeches) tended to be terse, concise, cogent, and structured without excess ornament or prolixity. One of his early works is an article for the *Yale Law Journal*, which he managed to research and write while a graduate student. As one of the two lead articles in the December 1932 *Journal* issue, it is entitled "Instructions to Juries—Their Role in the Judicial Process,"[13] a very practical, well-reasoned and penetrating analysis of a problem which to this day often perplexes jurists and lawyers, though less now because of standardized instructions. The problem, of course, is the procedural and substantive issues which arise from the use and function of jury instructions prepared by lawyers and modified by judges.

One of his articles, which may be of special interest to Ole

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that of the legal realists, has been felt throughout the legal profession, especially in the approach to law teaching and to the organization and content of casebooks. McDougal, a native Mississippian, received his A.B., A.M., and L.L.B. degrees from Ole Miss, the latter in 1927, and completed his B.A. and B.C.L. degrees from Oxford (Rhodes Scholar) in 1930. In 1931 he was awarded the J.S.D. degree from Yale. He is a former president of the A.A.L.S. (1966) and the American Society of International Law (1958). He is a recipient of the William and Mary "Marshall-Wythe Medallion" and countless other awards and honors from throughout the world.

[12] For a good description of this boldly innovative and admirable attempt to carry out fact research in law, not simply descriptively but also experimentally, see Rehbinder, *The Development and Present State of Fact Research in Law in the United States*, 24 J. LEGAL EDUC. 567, 567-89 (1972).

[13] 42 YALE L.J. 194 (1932), *reprinted in* 5 MISS. L.J. 203 (1933)(reprinted by permission of Yale Law Journal).

Miss law students and graduates, was written in March 1954 for the Centennial of the University of Mississippi Law School, entitled "The School of Law—The First Hundred Years."[14] This article traces the history of the law school from 1854, when Judge W.F. Stearns of Holly Springs was "elected to the chair" of law, up through Bob's deanship (which began in 1946) to the date of the centenary celebration.

Perhaps one of Bob's more erudite early works appeared as a lead article in the *Mississippi Law Journal* under the title, *"Coram Nobis: Another View"*.[15] In this article Bob examined in detail "one of the strangest developments in the law of Mississippi. . .the present so-called writ of error *Coram Nobis*, without pride of ancestry and now without hope of posterity. . . ." He prefaced his analysis by saying that the writer is encouraged to attempt what perhaps should have been reserved for one more profound in thought and facile in diction. He then proceeds to a thorough and elucidating examination of this "hybrid writ," the proper use of which, he said, "requires one to define the indefinable, describe the indescribable and unscrew the inscrutable—all because the court is dealing with one problem and talking in terms of another."

For a presumably complete list of Bob's major published works, please see the chart below.

Articles

Instructions To Juries — Their Role in the Judicial Process, 42 YALE L.J. 194 (1932) (later reprinted in 5 MISS. L.J. 203 (1933)).

Coram Nobis — Another View, 6 MISS. L.J. 327 (1934).

Proposed Amendment to Change the Manner of Selecting Judges, 8 MISS. L.J. 489 (1936).

Interpretation Re-Interpreted, 11 TUL. L.J. 266 (1937).

Admission to the Bar — A Comparison, 24 MISS. L.J. 275 (1953).

Let the Rough Side Drag, 3 TEX. B.J. 25 (1956).

Meaning of Not Meaning, 24 INS. COUNSEL J. 330 (1957).

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[14] 25 MISS. L.J. 87 (1954).
[15] 6 MISS. L.J. 327 (1934).

Biographies

Dean T.C. Kimbrough, 17 MISS. L.J. 307 (1946).

Judge Sydney McCain Smith, 19 MISS. L.J. 498 (1948) (in conjunction with W.G. Roberds and P. Stone).

Book Reviews

R. POWELL, CASES AND MATERIALS ON TRUSTS & ESTATES (1932) (reviewed in 5 MISS. L. J. 263 (1933).

AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF AGENCY (1933) (reviewed in 10 TUL. L. REV. 657 (1936)).

H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS (2d ed. 1938) (reviewed in 26 VA. L. REV. 237 (1939)).

R. BLAKEY AND G. BLAKEY, FEDERAL INCOME TAX (1940) (reviewed in 15 TUL. L. REV. 635 (1941)).

R. PAUL, STUDIES IN FEDERAL TAXATION (3d ed. 1940) (reviewed in 16 TUL. L. REV. 156 (1941)).

A. NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW (1943) (reviewed in 18 TUL. L. REV. 346 (1943)).

G. OSBORN, JOHN SHARP WILLIAMS (1943) (reviewed in 5 LA. L. REV. 629 (1944)).

D. DICKEY, S. PRENTISS SERGEANT: WHIG ORATOR OF THE OLD SOUTH (1945) (reviewed in 20 TUL. L. REV. 668 (1946)).

E. RABEL, 1 CONFLICT OF LAWS: A COMPARATIVE STUDY (1945) (reviewed in 20 TUL. L. REV. 674 (1946)).

R. O'SULLIVAN, INHERITANCE OF THE COMMON LAW (1950) (reviewed in 25 TUL. L. REV. 548 (1951)).

W. HAMILTON, ANGLO-AMERICAN LAW ON THE FRONTIER: THOMAS RODNEY AND HIS TERRITORIAL CASES (1953) (reviewed in 54 COLUM. L. REV. 661 (1954)).

C. MORRIS, MORRIS ON TORTS (1953) (reviewed in 14 LA. L. REV. 467 (1954)).

Dedications

The Published Works of John W. Wade, 25 VAND. L. REV. 2 (1972).

Editorial Comments

The Return to Peace, 20 TUL. L. REV. 129 (1945).

History

The University of Mississippi — School of Law Since 1854, 20 MISS. L.J. 249 (1949).

School of Law — The First Hundred Years, 25 MISS. L.J. 87 (1954).

TEACHER

> "A teacher who can arouse a feeling for one single good action . . . accomplishes more than one who fills our memory with rows and rows of natural objects, classified with name and form."
>
> *Johann Wolfgang Von Goethe*

Bob's love of the classroom was such that he continued to teach courses each semester following his assumption of the deanships at both Tulane and Ole Miss. Of his varied activities this was doubtless one of his true pleasures, which he once described humorously to his colleague, the late Bramlett Roberts, as "learning them the law."

As both a former law teacher and a student of Bob's, the author can unhesitatingly classify Bob as one of the more skillful and effective classroom teachers. He was one who used a more subtle and refined technique than that employed by the excessively verbose and histronic "screamer and strutter" type, so prevalent in many law schools today.

Bob once told the author that he thought one of the indispensable ingredients in successful teaching was the cultivation in the student of an "intense intellectual curiosity." The student, he said, "must develop an appetite for searching out a point of law to its last track, until he has satisfied himself that he has it by the tail." In other words, it is not very beneficial to the student to simply siphon off knowledge from a teacher's superior mind. Bob apparently tried to instill this attitude in all of his students.[16] Thus, he could lead them to the fountain, as it were, but they had to drink. In the final analysis, it was up to the

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[16] Some remarks recently made by Sir Frederick Pollock (the distinguished author of the work on Contracts), who has had great experience in legal education, are well worth quoting. He says:"Education is a difficult art; not the least of the difficulties is to make boys and young men do things which they would not do of themselves, and of which they cannot at the time understand the value," Dwight, *Columbia College Law School, New York*, 1 THE GREEN BAG 141, 146 (1889).

individual to "learn" the law for himself.

Bob's basic approach to teaching might fairly be described as both theoretical and practical. Armed with a current and thorough knowledge of his subject (usually torts, civil procedure or conflict of laws), he used a combined lecture and socratic technique. To this, he very cleverly and adroitly added the pungent spice of his unique brand of humor[17] and of anecdotal recollections from his days of law practice. One of his favorite aphorisms which stuck in my mind was that a lawyer must strive to develop the "conciseness of Benjamin Cordozo, the pith of Roscoe Pound and the lucidity of Learned Hand." Naturally conscientious, he was invariably prepared in his own assignments, with a mine of the most current information.

Few of us who were in Bob's classes as aspiring attorneys will forget that sudden panic experienced upon hearing our name called, followed by a quiet instruction to "please give that case," or to explain or explore some esoteric or complex postulate, which he might have been illustrating with some comical personal experience. One's response might be a slow, convoluted verbal journey or awkward groping in a jumble of legal vocables, hopefully toward some satisfactory conclusion. This meandering recitation might be infused along the way with additional queries by Bob, often mixed with his characteristic "uhs" or chuckles, until you were finally guided to a seemingly satisfactory comprehension of the point in issue.[18] Whenever Bob spot-

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[17] Somewhat typical Farley facetiae in the classroom might go like this: "And you say you are innocent of stealing the rooster from Jones?" the judge asked. "Yes, sir, I am innocent!" "You are confident you did not steal the rooster from Jones, as charged?" "Yes, sir, and I can prove it, yo honor!" "How is that?" "Judge, I couldn't have stole no rooster from Jones, cause I stole two hens from Smith that night, and Smith lives five miles from Jones." "Case dismissed!" the Judge announced. "The proof's conclusive."

[18]

> The Socratic method assumes that the architect who will build the conceptual structure from the cases and other materials is the student himself. In the laboratory of his own mind the data must become conceptual and analytical muscle. The teacher will not supply it neatly packaged. The student must flounder and struggle either to bring order to the data or to determine where order simply does not exist. The students may very well do most of the talking in class, however ill-informed, ill-prepared, or plain dense they may be.

Coons, *Pre-Law Handbook - Part One - Law Study and Practice in the United States*, 17 A.A.L.S. Publication (1967).

ted deficiencies or faults in logic or understanding he gently corrected them, without humiliation or embarrassment to the student.

Bob did not try to proselytize with any "pet theories" about politics or ideology and his class was not used as a "bully-pulpit" for indoctrination of a captive student audience. His objective was only to identify and discuss issues of law, and to constructively explore their variables and ramifications, all the while helping the student to raise his level of comprehension and deepen his understanding; ergo, by stimulating and thought-provoking discussion and analysis, to assist each student to develop his full resources and potential for legal reasoning. This sort of stimulus also provided the motivation for "self-help" beyond the classroom (research, reading and contemplation) which provides the only genuine proficiency in a subject.

Variety was one of the characteristics of Bob's instructional skills. He was both an analyst and a synthesist. Often he would encourage a vigorous dialogue of opposing views on a proposition, opinion, issue, or hypothetical case, in order to reach, by syllogistic reasoning, a thorough and intelligible apprehension of the subject matter. He regarded, based on the author's recollection, "black letter law" as the raw material and natural "building blocks" for expression and language of the law (as words are tools for communication and thought).[19] It was never to be taken

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> You will remember Socrates' demonstration in Plato's Meno that an illiterate slave boy can prove the Pythagorean Theorem. It's just a question of education—that is, of educing the proof from the boy by asking the proper questions. All great teachers are smaller Socrateses. You may recognize them as much by what you say to them as by what they say to you. In her introduction to a collection of essays, *Snoring as a Fine Art and Twelve Other Essays*, by the late Albert Jay Nock, Suzanne La Follette recalls a friend's remark: 'I don't know how he does it; but when you're with Albert Nock you find yourself coming out with things you didn't know you had it in you to say.' So with Mr. Van Doren. In his classes it was quite possible to be a poor student—that is, vulnerable to an examination—but it was harder to be a poor human being. He had then and has retained this curious faculty of making you say things you would swear were far beyond your mental capacity. Possibly he does not know to this day why he always found human beings more interesting than they really are.
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> C. FADIMAN, ENTER CONVERSING, 297-98 (1962).

[19] We must not take it that the established order [conceptual, nonfunctional and

as "infallible legal knowledge". It was merely one of the essential instruments of the profession. Conversly, he was a strong advocate of the theory that the "real law" (especially "civil") constitutes a "flow of decisions", based upon public policy. Of like mind with the major jurisprudential thinkers of today, law was perceived by him as a "legal process". . .a constituent part of the all-comprehensive "social-process" (of manifold factors and elements). Thus, to comprehend what the law is, or ought to be, at any given time the lawyer must first seek out these factors which underlie and produce legal decisions, opinions, and formulations. The successful advocate, he believed, must be able to identify, assimilate, and present these factors to a court in a persuasive way.

Nothing that the author has said about Bob's courses is meant to imply that all was painless for the student. Many students left his final examinations with a feeling of jubilation and confidence in their answers, only to learn later that their paper was pocked with flaws. Bob was no "easy mark", when it came to meeting high standards of academic quality and performance. Good grades from him did not come cheaply.

As to Bob's personal relations with his students, he was an obvious inspiration to many, primarily because he had faith in

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> traditional legal classifications and teaching method] is withstanding attack unscathed. In a stimulating and provocative article, H[arold] Laswell and [Myres] McDougal have proposed that the materials of law study should be reorganized to stress the policy needs of society. They accept 'the traditional assumption that it is imperative for the student to acquaint himself with the established legal syntax,' but argue for a new outlook and approach. 'A first indispensable step toward the effective reform of legal education,' they contend, 'is to clarify ultimate aim. We submit,' said they, 'this basic proposition: if legal education in the contemporary world is adequate to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic training for policy-making.' It is obvious, they believe, 'that our existing law school curriculum is not adequately oriented toward achieving the distinctive values and conditioning variables of a free society.' The major purpose of legal education, they maintain, 'is to promote the adaptation of legal education to the policy needs of a free society.' The authors deserve high credit for their emphasis on the need for raising the sights of legal education from the routine of case study to more important objectives . . . .

A. J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 67 (1953)(footnotes omitted)(quoting Laswell and McDougal, *Legal Education and Public Policy, Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943)).

and respect for anyone who demonstrated character and motivation. He encouraged all to persevere, regardless of their origin or past. He urged them to do their best, since conscientiousness and diligence bring rewards. Many with handicaps of various kinds did so, were ultimately awarded a degree and later achieved distinction in their careers.

In his own quiet way, especially by example, Bob also taught another important aspect of the law—the paramount importance of ethical and honorable deportment by all lawyers,[20] in whatever capacity or activity. The upholding of professional standards, based on his concept of public trust, was one of his ruling personal principles. Every attorney should feel this obligation, he felt.

Many of the lawyers in Mississippi for a long period of time had taken at least one course under Bob, during his eighteen years or more as dean and teacher. From conversations with many, they, as did I, generally regarded him with a mixture of affection, respect and awe. They deemed it their good fortune to have been one of his students and to have benefited from his friendship, knowledge, craft-wisdom, and inspirational example. As a teacher he left a lasting impression[21] and, I believe, accom-

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[20] Dr. Farley has contributed a great deal to the teaching of law as it should be done and to the establishment and maintenance of high ethical and professional legal standards. As a great lecturer at numerous law schools and as a public speaker he has accomplished much in the field of interpreting the law for students and making it intelligible to the layman.

Dean Farley's Service, Commercial Appeal, June 22, 1963, at 6, col. 2.

[21] Teaching several law classes was also part of Dean Farley's duties and he was regarded as a brillant instructor. Aaron Condon, a graduate of the law school and now a professor here, was a student in Dean Farley's [C]onflict of [L]aws class in the spring of 1952 . . . . [Condon said], 'he talked about those things with an extraordinary breadth of understanding and learning. He had a manner of approach that was unique in my experience. Every modulation of his voice, every word he used was entirely impromptu. It seemed to us to be totally calculated to produce an effect' . . . . William Champion, a 1961 graduate of the law school and also a law professor, was a student in Farley's Torts class—a two semester course . . . . 'In the classroom, Dr. Farley was a most unusual teacher,' Dr. Champion said. 'After listening to his lectures on so much abstract thought, after class you were surprised at how much concrete information you had in your notes'.

plished his goal, that is, improvement of minds and characters as well as the profession as a whole.

Bob's prowess as a teacher is attested by the fact that numerous other law schools tried to obtain his services, temporarily or permanently, at various times. Although a complete list of these is unavailable, it is of record that he also taught at the following schools:

1. Tulane Law School
2. University of Florida Law School
3. Ohio State University Law School
4. Southern Methodist University Law School
5. University of North Carolina Law School
6. Vanderbilt University Law School
7. Cornell University Law School

Dean and Academic Administrator

Upon assuming the deanship in 1945, it was Bob's task to revitalize the Ole Miss Law School and expand its facilities.[22] He immediately addressed himself to the herculean task of converting a very modest unaccredited facility into an outstanding law school capable of competing with the best in the nation, despite very limited financial resources. In his basic attitude toward legal education, Bob was an innovator, of like mind with Judge Learned Hand, who regarded the major functions of a law

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Purser, *Let the Roughside Drag*, Ole Miss Alumni Rev. Mar. 1983, at 10, 11.

> Bob Farley has been, he is and he will continue to be, so long as he remains in the law teaching profession, a professionally competent, skillful, intellectually honest teacher of what the law is and what we may reasonably expect the law to become. This is the genius of the man as a teacher. No better purpose could be entertained in this field and I honor him for it.

Address by Judge Claude F. Clayton (U.S.D.C.), in Tribute to Dean Robert J. Farley at the Unveiling of the Portrait of Dean Farley (Nov. 11, 1963).

[22] "[T]his giant of a man [Farley], had given up a career of distinction at Tulane University to return to Mississippi at a sacrifice of several thousand dollars in yearly salary." Silver, *supra* note 2, at 113; *see also* Cleghorn, *supra* note 2, at 42 (noting Farley's attraction to Ole Miss).

school and legal educative process as "contriving new methods, discovering new ideas,[and] surveying new territory."[23]

With his previous exposure to the philosophy of legal realism at Yale and being acquainted with the latest jurisprudential thinking and theories of law as being in the nature of a science, with emphasis on societal values and policy, Bob endeavored to design a curriculum less rigidly orthodox or standardized so that all students might have an opportunity to benefit from the most recent trends in legal education. He wanted them to realize the efforts being made by legal "scientists" to comprehend more correctly the essence and meaning of law in our society so as to enable the profession and legislatures to better deal with contemporary problems and cases. He wanted them to know that black letter law was not infallible legal knowledge, but merely one flexible tool for problem-solving. Even as early as 1897, the celebrated jurist, Oliver Wendell Holmes, had presciently perceived that "[f]or the rational study of the law the black-letter [law] man may be the man of the present, but the man of the future is the man of statistics and the master of economics."[24]

When Bob became dean the enrollment doubled, primarily due to returning veterans, but there were only four full-time teachers, one part-time teacher and a librarian. The library was small in space and contained comparatively few volumes. The school was unaccredited, but he was able to gain re-accreditation by the A.B.A. and the A.A.L.S. during his first year.

Realizing that the library is the "heart" and the faculty is the "soul", as it were, of a law school, he immediately focused his attention on these. He persuaded the highly competent and qualified librarian at Tulane, Miss Corinne Bass, to take the librarianship at Ole Miss. Next, he made some of his many appearances before the legislature to plead for funds to expand the library and faculty. His goal was to acquire as many volumes as needed for minimum respectability, and a comfortable facility conducive to study and research. As a consequence, during his deanship the number of volumes increased from 22,000 to

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[23] Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law?*, 24 MICH. L. REV. 466, 480 (1926).

[24] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

40,000. A modern and commodious new library was constructed. Books which had been piled on floors were shelved in conveniently accessible stacks. An assistant librarian was also employed.

Concentrating on his faculty and staff, he recruited some of the brightest minds in the profession, ultimately bringing the number to eight full-time and five part-time teachers.[25] Three new stenographers were hired, for a total of four. More space was naturally needed for this substantial increase in students and personnel, so the building was enlarged to more than double its original size. Moreover, the entire building was air-conditioned. Faculty salaries were ultimately trebled to bring them closer in line with competing regional accredited schools. This was seemingly a rather euphoric period for the law school.

The teachers Bob assembled, most of whom the author either studied under or knew well, were distinguished not only for their scholarship and credentials, but also for their personal magnetism and superior and diverse teaching techniques. Also, Bob possessed a type of charisma and quiet competence that inspired those around him to exert unusual effort to meet his standards and high level of integrity. Thus, these carefully chosen faculty members were apparently motivated to stretch their natural gifts to their limit, and in doing so, lift the school to an unusually high level of scholarship and repute.[26] A number of these teachers were, themselves, to later achieve eminence as deans, jurists, and practicing attorneys. Bob also expanded and up-dated the curriculum to encompass the courses needed to satisfy the recent trends in specialization, public law, and policy-oriented law.

As Ole Miss dean, Bob was a friend to all students. He dealt

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> Characteristic of the man [Farley] and his endeavor are the facts that the School of Law at Ole Miss, under his leadership as Dean, carried the highest average student population in its history, acquired its large and modern physical plant, gained its highest national recognition, and built up its strongest faculty with uniformly good faculty morale.

Clayton, *supra* note 21.

[26] "Farley has fought continuously to improve the law school and now it ranks as one of the top training institutions for lawyers in the South." Thomas, Personality in the News—Robert J. Farley (June 5, 1963)(unpublished Associated Press Bulletin).

kindly with everyone regardless of station. His informal manner, sincere amiability, and ever-open office encouraged a daily stream of students seeking his counsel or help in personal or academic matters; or just to simply exchange pleasantries or engage in jovial banter. It is common knowledge that he helped his graduates advance in their careers whenever possible, and in countless cases acted as a "one man placement bureau" in finding them jobs and writing recommendations. To students or graduates in financial difficulty, he was often their sole source of help. Humanitarian and compassionate person that he was,[27] his gifts and loans to the troubled endeared him to many a graduate who later received prominence and distinction at the bar, became a teacher, or assumed a deanship.

Whenever a suitable occasion provided, he entreated his students to always conduct themselves in a "lawyer-like manner", reflecting credit on themselves, their school, and their profession.

Being the kind of dean he was for 18 years, Bob undoubtedly had a direct hand in shaping the character, concepts, attitudes, and style of a multitude of practicing attorneys in Mississippi. Moreover, what the law school has achieved, and what quality and repute it has gained, is certainly due in large part to his legacy. The contributions made to the school by his administration and from his personality and character, both tangible and intangible, are countless. His eminence as a legal educator extended far beyond the confines of Mississippi. His personal integrity, energy, devotion, inspiration, and high repute, nationwide and beyond, helped build a law school to which any graduate could look with pride and honor.

Public And Professional Servant

As both a leader of lawyers and a professional educator, Bob was a genuine public servant. He possessed not only a strong

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[27] However, Farley could be a stern disciplinarian when circumstances warranted. The author recalls an episode regarding a fellow law student, a World War II combat veteran, who invariably carried a concealed weapon ("Army 45") to class. One day the gun fell out of his coat, and he quickly (involuntarily) left for Tulane with no questions raised about "due process."

sense of personal responsibility in offering his own services to the profession and public, but felt as well that an obligation of support and helpful cooperation was owed from the academic side of the law to the practical side, which attitude he continuously sought to instill in others. In this sphere of activity, his varied contributions over the years cannot be overestimated.

His election in 1956 to the Presidency of the Mississippi Bar Association while he was dean of the law school attests to the high esteem in which he was held by the state's practicing bar, as well as to the emphasis he placed on close association and mutuality of benefit between academics and advocates. In 1964 he was elected to and served as a member of the Board of Governors of the American Bar Association.

Following many years of active participation on various committees, seminars, and councils of the Association of American Law Schools, he was elected to the Association's Executive Committee in 1963. He was nominated for the presidency of the organization in 1964.

For many years Bob was extremely active in the area of law reform, and in the ongoing effort to restate (update and clarify) the law for the American Law Institute.

Bob served as Mayor of Oxford from 1924 through 1928, and as City Attorney from 1926 until 1931. From 1924 until 1928 he was a partner in the Oxford law firm of Somerville[28] & Farley. Thereafter, he practiced alone until 1931. During World War I he was a second lieutenant in the Army, and in World War II he served as Compliance Commissioner for the War Production Board and as Hearing Commissioner for the National Production Authority, as well as holding other war-related positions. He also assisted President Roosevelt in the 1930's in drafting remedial legislation for the New Deal.

Perhaps one of his major contributions, as well as recognitions, came in 1963 when he was selected by the American Bar Association to be one of its three principal panelists (along with U.S. Attorney General Nicholas Katzenbach and E.G. Marshall) for the annual meeting of the Association (86th Meeting - Chi-

[28] Thomas H. Somerville was a former dean at the Ole Miss Law School and President of the Mississippi Bar Association.

cago - August 12-16).[29] He also received the "Outstanding Lawyer-Citizen Award" from the Mississippi Bar Association at their 70th Annual Meeting in June 1975 "for his many long years of dedicated service to his country."[30]

Bob was also an active member of the following:

1. Order of the Coif
2. Blue Key[31]
3. Uniform Laws Commissioner, A.B.A.
4. Phi Delta Phi
5. Mississippi Economic Council (Director)
6. Tulane Tax Symposium
7. Sigma Epsilon
8. Sigma Chi (Social Fraternity)
9. O.D.K.

Bob's many public and professional contributions were of the kind which may have prompted Dean Page Keeton of the University of Texas Law School to remark that "[i]f [a legal educator] works hard and lives courageously, it can then be said that he lived for a time and it made a difference."[32]

Conclusion

In 1964 Bob left Ole Miss[33] and he went to the University of

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[29] The topic was "The Role of Lawyers in Democracy".

[30] *Lawyer-Citizen Award*, Oxford Eagle, June 23, 1975, at 10A, col. 1.

[31] Bob received the "Florida Blue Key Faculty Award" on November 8, 1967. "The coveted awards are made by the University leadership fraternity to faculty who have achieved academic excellence and made significant contributions resulting in distinction to themselves, the University and mankind." *FBK Faculty Awards Given*, University of Florida Campus, Nov. 9, 1967, at 1, col. 2.

[32] Keeton, *Legal Education: Developments, Objectives and Needs*, 20 Ark. L. Rev. 31, 41 (1966).

[33] Dean Farley's departure from the University of Mississippi was precipitated by his refusal to be intimidated by opponents of desegregation and by his plea for reasonableness, restraint, and peaceful compliance with the law, the courts, and the constitution.

[W]hen Farley later compounded his sins by offering to testify in court that

Florida where he served as Consultant to the Dean and Distinguished Professor for seven years. He later returned to Ole Miss and taught courses in the law school for several years. In appreciation for his services, the former law building (old Lamar Hall) for which he had worked so long to improve and which had subsequently become the home of the Journalism Department, was named in his honor. He was also inducted into the Ole Miss Hall of Fame and eventually was granted the title of Dean Emeritus.

His remaining years were spent in peaceful retirement, raising Tennessee Walking Horses on his small Oxford farm.

To those who would ask, "who was this man, Robert J. Farley?", I would answer: a priceless gift which nature bestows on the human race on rare occasions. In this instance the gift was a composite thinker, teacher, scholar, humorist, humanitarian, advocate, administrator, selfless public servant, and courageous guardian of Constitutional freedom and academic integrity. He was a friendly man. With all the honors that came to him, he never lost the common touch. He was a man of charity. He gave with a free hand and a benevolence of heart. He was a man of courage—always bravely willing to do what he considered right. He was a happy man. He never forgot how to laugh, and he knew how to make others laugh with his ever-ready wit and stories filled with life and good, clean fun.[34] He knew, too that there

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the law was on the side of Meredith, he too was eased out. Murphey and Farley were the house liberals on a faculty of Old South patricians comfortably enclosed in a feudal haven . . . . It was not so much that they resented Murphy and Farley, or even disagreed with them — it was just that the two men were a little too active, too involved, too visible, and it complicated things in a disagreeable fashion.

Egerton, *Shake-up at Ole Miss,* CHANGE MAGAZINE, Winter 1972-73, at 26.

Nearing retirement age in 1963, Dean Farley expressed an interest in maintaining a position as a member of the faculty. This desire was to remain unfulfilled.

> In the spring of 1963 the Chancellor advised Farley that in his opinion appointment by the Board on any basis after his retirement was unlikely. Gentleman, that he is, Farley went quietly. About the first of June he resigned because, as he told a friend, he did not want this school involved in further controversy . . . .

J.W. SILVER, MISSISSIPPI: THE CLOSED SOCIETY 114 (1964).

[34] Dean Farley's personality and his reputation as an entertaining speaker brought him many invitations to speak at banquets, conferences and seminars. 'Dean Farley was in great demand nationwide as an after-dinner speaker,' said

was a time and place for everything.

Certainly, his unique contributions to legal education alone have forever enshrined him as one of the giants of the profession. Before his death, his professional eminence and personal fame had spread far beyond the confines of his region, and he had become an international subject of admiration. Commentators around the world lauded him for his personal merits, statesmanlike service and contributions to educational rectitude. Reportedly, he was seriously considered as a recipient of the Nobel Peace Prize.

He never retreated from his duty, as he saw it. Had he acted otherwise, he would have lost respect for himself and would have felt ruined in his own estimation, which was to him the truest scale.

Running through his whole life is the intimation that what is just and right is the law of laws. Without question, Mississippi lawyers who studied under or knew Bob well will long bear his imprint and influence. For all, his life can indeed be a blueprint to emulate. He will unquestionably rank high in the test of time with past great men of Mississippi. His shield of valor should forever repose in the state's pantheon of legal heroes, along with such noble and illustrious lawyer-statesmen as L.Q.C. Lamar, John Sharp Williams, Leroy Percy, and S.S. Prentiss.

As S.S. Prentiss once said:

> Virtue forms no shield to ward off the arrows of death. Could it

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> [Ole Miss Law School] Dean Williams. 'He had a unique sense of wit, and he spoke all over the country'. Dean Farley remembers that he always centered his talks around a humorous subject. 'My topic was nonsense' he said, 'but I always got invited back to speak.' He recalled the title he frequently used for many of his speeches with a laugh. 'It was always the same: 'Let the Rough Side Drag.' Do you know what that means? I don't think I do.' Often his speeches blended humor and seriousness to illustrate his 'Farley philosophy of life,' recalling specific events in his life dating back to childhood from which he formed his 'Farley System of Evaluation.' Dr. Champion remembers hearing Dean Farley begin a talk on computers. 'This was a subject about which Dean Farley knew absolutely nothing.' Dr. Champion said, 'Bob was not a 20th century man by any stretch of the imagination. And he hardly talked about computers at all. It was still the most hilarious speech I had ever heard. The things he said were not really funny but the way he said them had everyone in the audience in stitches.'

Purser, *supra* note 21, at 12.

> have availed . . . then indeed this mournful occasion would never have occurred; and the life of [Robert J. Farley] would have been as eternal as his fame. Yet, though he has passed from among us—though that countenance will no more be seen that used to lighten up the van of [f]reedom's battles . . . still has he left behind his better part—the legacy of his bright example—the memory of his deeds.[35]

[35] S. S. PRENTISS, 10 LIBRARY OF SOUTHERN LITERATURE 4217 (1909)(eulogy on Lafayette).

THE *THORNBURGH* AND *BOWERS* CASES: CONSEQUENCES FOR *ROE V. WADE*

*James J. Knicely**

> *Stare Decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . . But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.
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> —Justice Brandeis, dissenting in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-407 (1932).

It has been written that the judiciary "is uniquely dependent upon the power of legitimacy when engaged in constitutional adjudication."[1] This is so because, as Hamilton observed in the Federalist, the judiciary lacks the power of the sword or the purse and must instead rely solely on judgment as its source of authority.[2] The "legitimacy" of the Supreme Court's construction of the Constitution thus depends, as Chief Justice Taney once observed, ". . . altogether on the force of the reasoning

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[1] A. Cox, The Role of the Supreme Court in American Government 103 (1976). *See also* Wardle, *The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions*, 1980 B.Y.U. L. Rev. 811, 813.

[2] *The Judges as Guardians of the Constitution*, The Federalist No. 78 (A. Hamilton).

by which it is supported."[3] If its construction diverges too far from the moral order and fails to command community acceptance and support, particularly over time, conflict and/or the exertion of force inevitably ensue and society becomes less free and secure.[4]

Fourteen years have now elapsed since the Supreme Court's decision in *Roe v. Wade*.[5] Criticism of the decision has been pervasive in the legal community,[6] in the legislative and executive branches of government,[7] and among broad segments of the American polity.[8] The great debate over the legitimacy of that decision continues unabated.[9] And despite several major oppor-

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[3] *The Passenger Cases*, 48 U.S.C. (7 How.) 283, 470 (1849) (opinion of Taney, C.J.).

[4] A. Cox, *supra* note 1; *see also*, Dewey, *Logical Method and Law*, 10 Cornell L.Q. 17, 26 (1924).

[5] 410 U.S. 113 (1973).

[6] A. Bickel, The Morality of Consent 27-29 (1975); A. Cox, *supra* note 1, at 113-114; J.H. Ely, Democracy and Distrust, 2-3, 248 n.52 (1980); Ely, *The Wages of Crying Wolf. A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973); Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1975 Sup. Ct. Rev. 159.

[7] *See, e.g.,The Human Life Bill: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 1120 (1982); R. Reagan, Abortion and the Conscience of the Nation (1984).

[8] Drinan, *The Abortion Decision*, 97 The Commonwealth 438 (1973)(opinion offers no satisfactory explanation as to why the right to privacy should prevent states from proscribing abortion); Editorial, *Supreme Court: Life, Death and the Law*, 135 America 21 (1976)(decision gives absolute authority and is comparable to capital punishment decisions); Flaherty, *Abortion, The Constitution and The Human Life Statute*, 108 The Commonwealth 586 (1981)(suggests reasons for reversal); Noonan, *Raw Judicial Power*, 25 Nat'l. Rev. 260 (1973)(criticizes *Roe v. Wade* as decision reached through inept use of history, schizophrenic style of judicial interpretation and misplaced response to needs of technocracy); *see generally*, D.M. O'Brien, Storm Center: The Supreme Court in American Politics 23-43 (1986).

[9] Even in the prochoice community, doubts about the morality of abortion are now surfacing. In a recent article in the Hastings Center Report, John Callahan, defender of abortion, writes:

> Most people seem to have a two-level response to the [abortion] issue. One, on the surface, is their public, professed position — what they tell strangers, pollsters, and themselves when under public attack. At another level, however, there is a more troubled private cauldron of jumbled beliefs, cross-cutting emotions, and easily triggered, raw-end sensibilities. I think of that as a kind of shadow self. That self is far less settled than the public self: the latter changes only slowly.
>
> Understood this way, the impact of the medical and scientific developments is likely to be felt first by the shadow self, where the rules of logic and evidence are less rationalistic but more probing. It is at that deep level where

tunities to refine the decision further, the perception remains that *Roe* is "a bad decision . . . . bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[10]

The members of the *Roe* majority in the Supreme Court have largely ignored criticism of the decision, choosing instead in subsequent cases to wrestle with the specific state attempts to regulate abortion that followed the decision in *Roe*. And despite suggestions by the United States in two recent abortion cases[11]

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the ultimate, hidden premises of our moral positions are to be found.

. . . .

The prochoice movement in its most political manifestation is particularly vulnerable to the medical and scientific developments. It has never made sufficient room in its public stance for a serious consideration of the fetus. Simultaneously, by deliberately cultivating a supposedly neutral, therapeutic language toward the medical act of abortion — calling it a "procedure", a "termination of pregnancy", and so on — it mistakenly seems to think it can pacify and comfort the secret self, minimizing and denaturing some unmistakable realities. There is still time to rectify that error, time for prochoice adherents to show themselves as willing in practice as in theory to concede the moral uncertainty of abortion decisions. If that is not done, the combination of the new medical developments and too many secret selves for too long holding their doubts at bar may well begin shifting some public selves. In that event, the prochoice movement will have done itself far more damage than those who try to stop it by bombing abortion clinics. The repression of self-doubt has an even more explosive potential than nitroglycerin.

Callahan, *How Technology is Reframing the Abortion Debate*, 16 HASTINGS CENTER REPORT 33, 41 (1986).

[10] *See* Ely, *supra* note 6 at 947. The Court has decided 14 abortion cases since *Roe v. Wade* and *Doe v. Bolton*. In two recent cases, the Court rebuffed suggestions by the United States to refine or reexamine *Roe*. *See* note 11 *infra*.

[11] Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986) and City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

In *Akron*, the Solicitor General of the United States, Rex E. Lee, filed a brief *amicus curiae* urging the Court to adopt a new standard of review in cases involving public policy issues like abortion that would give greater deference to legislative judgments. It was argued that such deference is appropriate because public policy issues usually involve strong competing interests the successful resolution of which requires the full and uninhibited discussion found in the legislative process. Moreover, legislative bodies are uniquely equipped to resolve controversial issues because they possess superior fact-finding capabilities, are directly responsible to the public and have greater flexibility to fine tune and redirect efforts if solutions prove to be ill-founded or unwise. The Court responded to this plea by reaffirming *Roe* on grounds of *stare decisis*. *Akron*, 462 U.S. at 419-420, n.1.

In *Thornburgh*, a new Solicitor General, Charles Fried, took a broader tack and sug-

that the Court overrule *Roe* or defer to state legislative efforts to regulate abortion, the members of the original *Roe* majority—though diminishing in number[12]—have responded not only with a steadfast determination to reaffirm *Roe*, but to invalidate most state attempts to regulate abortion as well. At the same time, however, these decisions have produced unusually vigorous and thoughtful dissents, raising new arguments and lending fresh doubt about the validity and legitimacy of *Roe*.

The opinions of Justice White in two cases decided in the 1986 Term of the Supreme Court-—*Thornburgh v. American College of Obstetricians and Gynecologists*[13] and *Bowers v. Hardwick*[14]-—are especially noteworthy for their extraordinarily forceful reasoning with respect to the "legitimacy" of *Roe* and the scope and extent of the privacy doctrine. Much of Justice White's dissent in *Thornburgh*, a biting and thorough refutation of the reasoning in *Roe*, is undisguisedly transformed into the majority view in *Bowers*, where the Court rejects the philosophical underpinings of *Roe* (without rejecting *Roe* itself) and declines to confer a constitutionally sanctioned right of privacy on homosexual sodomy. In this rejection, the new majority is not

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gested that "the textual, doctrinal and historical bases for *Roe v. Wade* is so far flawed and . . . is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it." Brief for the United States as Amicus Curiae in Support of Appellants at 2. *Thornburgh*, 106 S. Ct. at 2169 (1986). Again, the Court reaffirmed *Roe*. *Id.*

[12] The original vote in *Roe* was 7-2, with Justices White and Rehnquist dissenting. There followed the attrition of Justices Douglas and Stewart and the addition to the Court of Justices Stevens and O'Connor, with Justice O'Connor, in limited degree, joining the dissenting view, to make the division 6-3. In *Thornburgh*, Chief Justice Burger, a member of the original *Roe* majority, reversed his earlier position and suggested the need for a re-examination of *Roe*, expressing dissatisfaction with the Court's subsequent elaboration of that decision. The division on the Court was thus narrowed to 5-4. *Thornburgh*, 106 S. Ct. at 2169. Chief Justice Burger and Justice Powell have since resigned and as of this writing, Justice Scalia has been appointed, and Judge Robert Bork nominated to the Court. The views of Messrs Scalia and Bork (if confirmed) on the issue should become known when the Court decides Hartigan v. Zbaraz, 763 F.2d 1532 (7th Cir. 1985), *jurisdiction postponed*, 107 S. Ct. 267 (1986) (No. 86-673), which has been postponed to the October 1987 Term of Court.

[13] 106 S. Ct. 2169 (1986). Not without irony, this decision reaffirming the abortion right in *Roe v. Wade* was announced on the same day that the Court sustained the Bald Eagle Protection Act and the Endangered Species Act passed by Congress to prevent the killing of bald eagles. United States v. Dion, 106 S. Ct. 2216 (1986).

[14] 106 S. Ct. 2841 (1986).

hesitant to identify what it views as the dangers in acceding to such an invitation:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clause of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.[15]

Bowers may eventually prove only to be an anomaly arising from a greatly divided public opinion about the acceptability of homosexual conduct. But the views expressed by Justice White in the *Thornburgh* and *Bowers* cases are nevertheless potentially significant as a distinct philosophical break with the modern line of right to privacy decisions that began with *Griswold v. Connecticut*.[16] Justice White's opinions propose definite limits and boundaries with respect to the right to privacy, with the *Bowers* opinion actually applying such limits and boundaries to preclude extension of privacy doctrine to homosexual conduct.

Thornburgh and *Bowers* are also significant for the unconcealed, apparently deep, and even bitter, division among members of the Court on the social issues of abortion and homosexuality. One need only skim the language of the opinions for their key words — "fundamentally misguided," "baffling," "bad," "extraordinary," "nonsensical," "highly inappropriate," "mistaken," "illegitimate," "warped," "tortuous," "unworkable,"

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[15] *Bowers*, 106 S. Ct. at 2846.

[16] 381 U.S. 479 (1965).

"unprecedented," "distorted," "outmoded," and "aberration" — to learn how deep the split on the Court runs on these issues. It is also rare, as in *Thornburgh*, to find three Justices openly and directly questioning the "legitimacy" of a prior decision[17], with a fourth abandoning a prior vote and urging "reexamination" of that decision.[18] It is equally unusual to find a Justice complaining of the "institutionally debilitating effect"[19] of an issue on the Court's ability to decide evenhandedly otherwise normally uncontroversial legal doctrines that become "controversial" when entangled with that issue.

The validity of *Roe* as *sui generis* from the *Griswold* line of cases, has, of course, been discussed vigorously by both friend[20] and foe[21] alike of abortion. Seldom before, however, has the dissent on the Court been vociferous as in *Thornburgh*, and rarely, if ever, has a majority of the Court so vigorously expressed its disdain for "judge-made constitutional laws having little or no

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[17] In two opinions, both joined by then Associate, now Chief, Justice Rehnquist, Justice White argues that *Roe* is "illegitimate". *Thornburgh*, 106 S. Ct. at 2195. Justice O'Connor also disputes the "legitimacy" of the Court's attempt to discredit and preempt state abortion regulation regardless of the interests it serves. *Id.* at 2214.

[18] Dissenting in *Thornburgh*, Chief Justice Burger concludes that the Court in its elaboration of *Roe* has abandoned the important state interests of protecting maternal health and potential life, permitting, instead, abortion on demand with little or no regard to these interests. For this reason, he calls for a re-examination of *Roe*. *Thornburgh*, 106 S. Ct. at 2190-2192. In *Doe v. Bolton*, the companion case to *Roe*, the Chief Justice had concurred in the majority opinion, stating separately: "Plainly the Court today rejects any claim that the Constitution requires abortions on demand." *Doe v. Bolton*, 410 U.S. 179, 208 (1973). At the time, Professor, now United States Circuit Judge, John T. Noonan, Jr., commented on this statement: "Here is a desperate attempt to recapture in a single sentence what the Court has given away in its list of criteria mandated by the Constitution." Noonan, *supra* note 8, at 261.

[19] *Thornburgh*, 106 S. Ct. at 2207 (O'Connor, J., dissenting). These are the words Justice O'Connor uses to describe the Court's apparent inability to apply evenhandedly normally uncontroversial legal doctrines when raised in cases involving abortion. This criticism has been raised before. In *Planned Parenthood of Central Missouri v. Danforth*, Justice White complained that "normal rules of law and procedure and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion." Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 98 (1976)(White, J., dissenting).

[20] The most well-known and representative criticism by those sympathetic to abortion is Dean Ely's in the Yale Law Journal. *See supra* note 6.

[21] *See, e.g.*, Wardle, *supra* note 1 (arguing that *Roe* is not in line with moral order); Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. REV. 231 (overview of flaws in *Roe*); *see also supra* notes 6 & 8 and accompanying text.

cognizable roots in the language or design of the Constitution" as in *Bowers*.[22] The opinions in these cases are, therefore, deserving of analysis if only because "those doctrines only will eventually stand which bear the strictest examination and the test of experience."[23]

This Article will first analyze the significance of the Court's treatment of the procedural and constitutional questions presented by the Pennsylvania Abortion Control Act.[24] It will then review the broader constitutional concerns relating to *stare decisis* and the proper institutional role of the Supreme Court. Finally, the Article will analyze the colloquy between Justices White and Stevens in *Thornburgh*, the dissenting opinion of Justice O'Connor in *Thornburgh* and the majority opinion in *Bowers v. Hardwick*, all with respect to the consequences of the arguments advanced therein for *Roe v. Wade*.

I. The Pennsylvania Abortion Control Act

Thornburgh involved a challenge to Pennsylvania's regulation of abortion. The Pennsylvania statute included requirements (i) that certain information be provided to abortion recipients, (ii) that doctors keep records and report on abortions performed and (iii) that certain medical standards be established for physicians performing abortions.[25] The 5-4 opinion upholding the Court of Appeals decision invalidating the Pennsylvania statute was written by Justice Blackmun, the author of *Roe v. Wade*. The case raised both procedural and substantive constitutional issues. The majority's extraordinary boldness on the procedural questions, as well as its evident aggressiveness in striking down all aspects of the Pennsylvania statute carries portents, for reasons explained below, that go well beyond the decision itself.

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[22] *Bowers*, 106 S. Ct. at 2846.

[23] Barden v. Northern Pac. Ry., 154 U.S. 288, 322 (1894)(Field, J).

[24] The Abortion Control Act, 18 Pa. Cons. Stat. §§ 3201 et seq. (1983) [hereinafter Act or Pennsylvania statute].

[25] The challenged provisions of the Act are set forth in Appendix A of the Third Circuit opinion in American College of Obstetricians v. Thornburgh, 737 F.2d 283, 304 (3rd Cir. 1984).

A. The Procedural Issues

Two procedural issues were presented in *Thornburgh*. The first was jurisdictional. The Court of Appeals had determined that only certain provisions of the Act were unconstitutional and had remanded for trial certain other provisions. This raised the issue of whether its judgment was "final" in the ordinary meaning of that term. The Supreme Court ruled that under such circumstances the appellate court judgment was not final, relying on an 1891 decision, *McLish v. Roth*.[26] This ruling, however, did not prevent the Court from proceeding to decide the substantive issues in the case, for, as Justice Blackmun wrote, "[W]e nevertheless treat appellant's jurisdictional statement as a petition for certiorari, grant the writ, and move on to the merits."[27].

The second, more substantial and controversial procedural issue arose from the fact that *Thornburgh* was appealed from a trial court determination on a motion for a preliminary injunction. The normal standard for review on appeal of such an issue is "whether the trial court abused its discretion in finding the presence or absence of irreparable harm and a probability that the plaintiffs would succeed on the merits."[28] The Commonwealth of Pennsylvania argued that the Court of Appeals exceeded this limited review by invalidating the Act on the constitutional merits of the case.

Although the *Thornburgh* majority opinion recognizes that judicial review of a preliminary injunction order is normally confined "to preserv[ing] the relative positions of the parties,"[29] this approach is not, in the opinion's words, "inflexible."[30] The majority finds support for this position in *Youngstown Sheet &*

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[26] 141 U.S. 661, 665-668 (1891).

[27] *Thornburgh*, 106 S. Ct. at 2176. Justice White, in dissent, terms the Court's procedural rulings as " somewhat extraordinary." Although he expresses little disagreement as to including a finality requirement in 28 U.S.C. 1254(2) (1985), the Court's ruling was presumably extraordinary because of the blatant contrast between the majority's difficulty in considering the Court of Appeals ruling as "final" for purposes of establishing appellate jurisdiction, and the majority's apparent ease in proceeding to plenary review of the constitutional issues in derogation of the normally limited standard of review for cases appealed from a preliminary injunction. *Id.* at 2192-2206.

[28] *Id.* at 2176.

[29] *Id.*

[30] *Id.*

Tube Co. v. Sawyer[31] and *Smith v. Vulcan Iron Works*[32], cases in a like posture where the Court had proceeded to the substantive constitutional merits in the context of preliminary injunction orders.[33] In reliance on these cases, the majority upholds the Court of Appeals' "plenary review" of the issues in *Thornburgh*,[34] finding that the rule of limited review imposed on an appeal from a preliminary injunction is merely a "rule of orderly judicial administration, not a limit on judicial power."[35] Thus, in the Court's words, "if a district court's ruling rests solely on a premise as to the applicable rule of law, *and the facts are established as of no controlling relevance*, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction" (emphasis supplied).[36]

This ruling is indeed extraordinary. It represents a dramatic departure from an established procedural norm that affords litigants a fair opportunity to develop the facts and supplies judges a needed predicate to determine whether or not the facts as developed are relevant or necessary to the law to be applied. In derogation of the newly adopted amendments to Rule 52(a) of the Federal Rules of Court Procedure,[37] which unmistakably recognize trial courts, not appellate tribunals, as the ultimate finder of facts, the *Thornburgh* majority nevertheless arrogates to itself the judgment that the facts are not or would not be of controlling relevance to the constitutional issues involved.

It is this second procedural issue that evokes a strong reaction from both Justices O'Connor and White. Agreeing that there may be narrow exceptions to the rule of limited review in preliminary injunction cases, they object vigorously to the Court's determination that *Thornburgh* is such a case. Justice O'Connor bluntly argues that the majority's analysis "mis-

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[31] 343 U.S. 579 (1952).

[32] 165 U.S. 518 (1897).

[33] *Thornburgh*, 106 S. Ct. at 2176. The majority also relies on its abstention decisions holding that federal courts need not abstain from decision "when the unconstitutionality of the particular state action under challenge is clear." *Id.*

[34] *Id.* at 2177.

[35] *Id.*

[36] *Id.*

[37] *See* FED. R. CIV. P. 52(a), Notes of Advisory Committee on Rules (1985 Amendment).

characterizes the proceedings in the District Court and is unsupported by precedent and logic."[38] This is not a case with a complete record or with facts that are fully established, but one based only on preliminary affidavits and a stipulation agreed to "solely for the purpose of testing for preliminary injunction."[39] Quoting a prior opinion of Justice Blackmun, Justice O'Connor frames the issue as a matter of legal principle:

> The distinction between the preliminary and final injunction stages of a proceeding is more than mere formalism. The time pressures involved in a request for a preliminary injunction require courts to make determinations without the aid of full briefing or factual development, and make all such determinations necessarily provisional. *Firefighters v. Stotts*, 467 U.S. 561, 603-604, n.7 (1984)(Blackmun, J., dissenting.)[40]

Fairness to the parties and reliable adjudication require "final, binding rulings on the merits of a controversy to be made only after each side has had an opportunity to establish its version of the disputed facts or to establish that the facts are not in dispute."[41]

A second, but related, concern is that appellate courts generally do not take under consideration issues that a party fails to raise in the trial court. This permits cases to mature fully before decision and eliminates unfair surprise to litigants, there having been no opportunity to introduce evidence on the new matter. Justice O'Connor notes that this principle, too, is breached by allowing an appellate court to proceed to decision on the merits prior to trial based on an insufficiently developed trial record.

Justice O'Connor also disputes the validity of the precedents relied upon by the majority to justify *Thornburgh* as an exception to the general rule of limited review. The steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*[42], involved a true emergency of national proportions, where time was manifestly of

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[38] *Thornburgh*, 106 S. Ct. at 2209 (O'Connor, J., dissenting).

[39] *Id.*, citing the trial court opinion reported at 552 F. Supp. 791, 794, n.1 (E.D. Pa. 1982).

[40] *Thornburgh*, 106 S. Ct. at 2210 (O'Connor, J., dissenting).

[41] *Id.*

[42] 343 U.S. 579 (1952).

the essence. There was no emergency in *Thornburgh* that a judicial stay pending appeal would not have remedied. The other case cited by the majority, *Smith v. Vulcan Iron Works*[43], was appealed under a statute granting appellate jurisdiction from interlocutory decrees and was decided after the parties had joined issue on the merits in the trial court.[44] There was no special statute conferring interlocutory and appellate jurisdiction in *Thornburgh*, nor was there a trial on the merits.

It is also argued that the new exception carved out in *Thornburgh* will prove "vexatious to administer," encouraging parties to short-circuit litigation by turning "preliminary injunction proceedings into contests over summary judgment or full-scale trials on the merits" and making litigation "more expensive, less reliable and less fair."[45] Justice O'Connor cynically concludes:

> If this case did not involve state regulation of abortion, it may be doubted that the Court would entertain, let alone adopt, such a departure from its precedents.[46]

Justice White is equally uncharitable concerning the majority's disposition of the case. Characterizing the Court's second procedural ruling as "highly inappropriate," he objects particularly to the fact that the constitutionality of the Pennsylvania statute is made to turn solely on the basis of affidavits and a limited stipulation of undisputed facts, none of which, in his words "provides a sufficient basis for a conclusive finding on the complex question of the motive and effect of the reporting requirements and the adequacy of the statute's protection of the anonymity of doctors and patients."[47]

In conclusion, it is not hyperbole for Justice O'Connor to warn of the "institutionally debilitating effect" of the abortion

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[43] 165 U.S. 518 (1897).

[44] Justice O'Connor likewise questions the majority's reliance on federal abstention cases. *Thornburgh*, 106 S. Ct. at 2212. To say that abstention is not required in instances where the unconstitutionality of state action is clear is merely to beg the question in the context of constitutional issues and parties deserving a full opportunity for a hearing by a court vested with authority to determine facts. *Id.*

[45] *Id.* at 2213 (O'Connor, J., dissenting).

[46] *Id.*

[47] *Id.* at 2202.

issue. Were this a case other than one involving abortion, the Court would no doubt have followed precedent and remanded the case for trial and full development of the record.[48] The Court's extravagant ruling ultimately damages the integrity of the judicial process. The precedents it cites do not support its reasoning and no principles of law justify the new exception that it creates. Most significantly, the substance of the decision abridges the underlying purpose of the rule of limited review for cases arising in the context of a preliminary injunction: fairness to litigants and development of a complete record that facilitates impartial judicial review. Fundamental due process, let alone lay notions of due process, have always encompassed a litigant's right to his/her "day in court", i.e., adjudication of facts in the context of a full adversarial hearing. In this case, however, *assumption* of facts replaces adjudication of facts and the personal policy preferences of the majority appear to override any semblance of procedural fairness. The Court's unprincipled disposition of the procedural issues appears as much an exercise of raw judicial power as the decision in *Roe v. Wade* itself.

B. Legislative Motivation

Before proceeding with its review of the constitutionality of the challenged statutes, the majority opinion in *Thornburgh* painstakingly recites the history of the Pennsylvania Act. Among the facts deemed relevant are the following: (1) the Act had been offered as an amendment to a pending bill to regulate paramilitary training[49]; (2) it was not Pennsylvania's "first attempt . . . to impose abortion restraints," this being done in 1974 (over the Governor's veto and resulting in a successful court challenge) and in 1978 (again, successfully challenged in court), and later in 1981 (again over the Governor's veto)[50]; (3)

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[48] Compare the Court's decision to ignore procedural limitations in *Thornburgh* with the Court's refusal to decide the merits of two other cases decided the same Term for lack of standing, in part because of a concern that facts should be fully developed in an adversarial proceeding, *Bender v. Williamsport Area School District*, 106 S. Ct. 1326, 1331 n.5 and related text (1986), and *Diamond v. Charles*, 106 S. Ct. 1697, 1706-1707 (1986).

[49] *Thornburgh*, 106 S. Ct. at 2173.

[50] *Id.* at 2173-74.

the Act was proposed as an amendment to a pending bill to outlaw "Tough-Guy Competition"[51], and (4) the Act was patterned after a model statute developed by a Chicago-based, non-profit "anti-abortion" organization.[52]

The relevance of these facts is difficult to comprehend. Justice White duly notes this obviously belabored treatment of the facts, writing that "the history of the State Legislature's decade-long effort to pass a constitutional abortion statute is recounted as if it were evidence of some sinister conspiracy."[53] Taken in its best light, the majority's recitation of the facts was apparently a parrotting of the panel opinion in the Third Circuit, which noted that the bill was based on a "model developed by Americans United for Life, a Chicago-based nonprofit organization".[54] That opinion also quoted statements reported by *The Philadelphia Inquirer* from a news conference of the leader of the legislative floor debate on the bill. The panel opinion further noted that the bill had failed on its own in committee and was attached and deemed "germane" to the "tough guy" competition legislation.[55]

The Third Circuit's recitation of these "facts", and the Supreme Court majority's implied approval of this analysis, suggests an absence of requisite objectivity. It is disturbing that cases are decided upon facts, otherwise inadmissible under the Federal Rules of Evidence, that are selected and portrayed *ad hominem* and by innuendo. Moreover, the purportedly offending statement by the leader of the legislative floor debate is drawn from a *newspaper* and based on statements made in a press conference, not from statements reported in official legislative journals or made in committee deliberations or on the floor of the legislature.

The facts aside, the majority also repeatedly calls into ques-

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[51] A footnote in the opinion describes such competition as a physical contact between persons without professional experience who attempt to render each other unconscious. *Id.* at 2174, n.3.

[52] *Id.* at 2174.

[53] *Id.* at 2198.

[54] American College of Obstetricians v. Thornburgh, 737 F.2d 283, 288 n.2. (3rd Cir. 1984), *aff'd*, 106 S. Ct. 2169 (1986).

[55] *Id.* at 288 n.3.

tion the motivation of the Pennsylvania Legislature in enacting the challenged provisions. Despite the absence of a factual record on which to make such judgments, time and again in its analysis of the respective provisions of the Act, the Court reads in what it views as an impermissible legislative motivation.[56] It is an unseemingly jurisprudential irony for the nation's highest court to impugn legislative motives and lunge to final judgments on a very preliminary and limited record, while at the same time depriving litigants of a fair opportunity to present evidence and establish a record on which more deliberate and considered conclusions and judgments could be properly made. *Thornburgh* can be rightly depicted in the law school classroom as an opinion displaying an obsession with protecting the judicial prerogative at the cost of basic fairness in the legal process.

This subjective mode of constitutional analysis, which relies more on perception and "feel" than on fact, has, unfortunately, become more prevalent in Supreme Court adjudication in recent years.[57] It departs from the long established principle, rooted in the separation of powers and in deference to legislative judgments, that the Court "will not strike down an otherwise constitutional statute solely on the basis of an alleged illicit legislative motive."[58] Statements of legislators have heretofore been relevant in constitutional adjudication *only* to determine the purpose of the legislation, not its motivation. In *United States v. O'Brien*, the Court said:

> It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to

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[56] The Court employs words and phrases such as "seemingly designed," "under the guise," "outright attempt," "poorly disguised," "gratuitous advice," "belie" and "intentional" to describe the actions of the Pennsylvania Legislature. *Thornburgh*, 106 S. Ct. at 2180-2183.

[57] See Edwards v. Aguillard, ____ U.S. ____, 55 U.S.L.W. 4860, 4868-69, 4875-77 (June 19, 1987)(Scalia, J., dissenting); Wallace v. Jaffree, 105 S. Ct. 2479, 2483, 2490 (1985).

[58] United States v. O'Brien, 391 U.S. 367, 383 (1968).

> eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a wiser speech about it.[59]

The Court has also stated that "[t]he diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile."[60] Otherwise, as Justice Cardozo once commented, "the process of psychoanalysis [is] spread to unaccustomed fields,"[61] further observing that "[t]here is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful."[62]

That the *Thornburgh* majority's perception of legislative motive weighs heavily in its decision cannot be doubted. It permeates virtually every aspect of the majority opinion. As Justice O'Connor protests in dissent:

> [T]he Court strains to discover "the anti-abortion character of the statute" and . . . invents an unprecedented canon of construction under which "in cases involving abortion, a permissible reading of a statute is to be avoided at all costs."[63]

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[59] *O'Brien*, 391 U.S. at 384. *See also* Palmer v. Thompson, 403 U.S. 217, 224-225 (1971); Epperson v. Arkansas, 393 U.S. 97, 113 (1968)(Black, J., concurring); Tenny v. Brendhove, 341 U.S. 367, 376-77 (1951)(acts passed in "sphere of legitimate legislation" are protected from suits based on "claims of an unworthy purpose"); Arizona v. California, 283 U.S. 423, 455 (1931)(Court refuses to consider legislative motives preempting passage of Act in question); Soon Hing v. Crowley, 113 U.S. 703, 710-11 (1885)(discussing general rule that courts may not inquire into motives of legislative bodies enacting laws); Fletcher v. Peck, 10 U.S. 87, 130-31 (1810)(if legislative act under attack was "clothed with all the requisite forms of law," court may not sustain suit based on allegations of "impure motives").

[60] Soon Hing v. Crowley, 113 U.S. 703, 711 (1885).

[61] United States v. Constantine, 296 U.S. 287, 298-99 (1935)(Cardozo, J., dissenting).

[62] *Id.*, at 298-99.

[63] *Thornburgh*, 106 S. Ct. at 2214. Two judges of the Third Circuit also questioned the zeal of the panel in invalidating the Pennsylvania legislation. Judge Weis wrote on denial of the petition for rehearing:

> Perhaps most significant, in my opinion, is the panel's general failure to give proper weight to the legislative decision, as expressed in the Statute, to protect the life and health of the woman and the child subject to abortion . . . .
> Our function as a federal court is to determine whether a state statute violates the federal constitution. If a statute may be construed to be constitutional, then we must adopt that interpretation. "Courts may not substitute for the

The Court's extraordinary departure in *Thornburgh* from well established rules of judicial review thus reveals a partisanship that undermines, rather than reinforces, the legitimacy of *Roe* and the judicial prerogative.

The majority's apparent resolve on the issue of abortion is perhaps most evident in a prefatory declaration of a type seldom seen in a Supreme Court opinion: "The states are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies."[64] This warning is preceded by a citation to *Brown v. Board of Education*,[65] presumably an indication that the majority's resolve extends by analogy to the root and branch of any effort by the states to resist the Court's decision in *Roe v. Wade*.[66] The present situation, however, is not totally analogous to *Brown* because in *Brown* the fourteenth amendment provided an explicit and settled constitutional mandate to justify the decision, apart from the moral force of the decision's reasoning. The problem with *Roe* is its failure to "trace its premises to the charter from which it derives its authority."[67] Thus, the majority's citation of *Brown* in *Thornburgh* only further exaggerates the underlying weakness of *Roe* as a precedent. As Justice White comments:

> The decision today appears symptomatic of the Court's own insecurity over its handiwork in *Roe v. Wade* and the cases following that decision. Aware that in *Roe* it essentially created

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judgments of legislators their own understanding of the public welfare, but must instead concern themselves with the validity under the Constitution of the methods which the legislature has selected."

Thornburgh, 737 F.2d at 319 (citations omitted).

Likewise, Judge Adams wrote:

Not all might agree with these measures, but a law is not void because it "may seem to the judges who pass upon it, excessive, unsuited to its ostensible end, or based on conceptions of morality with which they disagree." The Constitution does not embody a particular set of ethical principles, and judges are under a special duty in passing on the legitimacy of legislation not to constitutionalize that which legally speaking is in the end only of a personal preference.

Id. at 317.

[64] *Thornburgh*, 106 S. Ct. at 2178.

[65] 349 U.S. 294 (1955).

[66] *Thornburgh*, 106 S. Ct. at 2178.

[67] Ely, *supra* note 6, at 949.

> something out of nothing and that there are many in this country who hold that decision to be basically illegitimate, the Court responds defensively. Perceiving, in a statute implementing the State's legitimate policy of preferring childbirth to abortion, a threat to or criticism of the decision in *Roe v. Wade*, the majority indiscriminately strikes down statutory provisions that in no way contravene the right recognized in *Roe*. I do not share the warped point of view of the majority, nor can I follow the tortuous path the majority treads in proceeding to strike down the statute before us.[68]

C. The Statutory Provisions.

The specific requirements of Pennsylvania law invalidated in *Thornburgh* relate to informed consent, distribution of certain printed information, abortion reporting, medical determinations of viability, standards of care in post viability abortions and the presence of second physicians in certain circumstances. The Supreme Court's treatment of these provisions is discussed below in greater detail.

1. *Informed Consent and Printed Information.* The Pennsylvania statute requires that a woman give her "voluntary and informed consent" to an abortion.[69] Section 3205 of the Act includes a requirement that specified categories of information be delivered to the woman at least 24 hours[70] before the abortion, some by the woman's physician.[71] The woman is also to be ap-

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[68] *Thornburgh*, 106 S. Ct. at 2206 (White, J., dissenting).

[69] Section 3205(a) of the Act.

[70] Section 3205(a)(1) and (a)(2) of the Act.

[71] Section 3205 of the Act requires that a woman be informed 24 hours before the abortion of:

(i) the name of the physician who will perform the abortion;

(ii) the "fact that there may be detrimental physical and psychological effects which are not accurately foreseeable;"

(iii) the "particular medical risks associated with the particular abortion procedure to be employed" including, when medically accurate the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility;

(iv) the probable gestational age of the unborn child at the time the abortion is performed; and

(v) the "medical risks associated with carrying her child to term."

In addition, the woman is to be informed that medical assistance benefits may be available for prenatal care, childbirth and neonatal care, that the father is liable to assist in

prised of the availability of certain written materials printed and supplied by the State's Department of Health describing fetal development and listing agencies offering alternatives to abortion.[72]

Relying on the Court's prior decision in *Planned Parenthood of Central Missouri v. Danforth*,[73] (to the effect that state-directed or -supplied information must inform and not persuade or intrude on the physician's discretion), the majority invalidates the informed consent provision as an attempt to "wedge" the state "into the privacy of the informed-consent dialogue between the woman and her physician."[74] The informational requirements are characterized as "intrusive", sending "a message discouraging abortion", which may serve "only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practices."[75] Thus, in an era when patient education and self-determination is the rule, the Court, in effect, prohibits states from requiring the dissemination of information relating to medical treatment options and patient health, at least with respect to abortion.

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the support of the child and that she has the right to review printed materials with respect to fetal development and abortion alternatives. *Thornburgh*, 106 S. Ct. at 2178-79.

[72] Section 3208 of the Act requires that the State Department of Health publish (1) geographically indexed materials about public and private agencies and services available to assist women with pre- and post-natal problems and (2) materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival. The latter materials are to be "objective, nonjudgmental and designed to convey only accurate scientific information about the unborn child at the various gestational ages." Section 3208(a)(2).

The materials listing public and private agencies and services are to include the following statement:

> There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or place him or her for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making your final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion.

Section 3208(a)(1) of the Act.

[73] 428 U.S. 52 (1976).

[74] *Thornburgh*, 106 S. Ct. at 2179.

[75] *Id.*

The requirement that a list of abortion alternative agencies be provided is likewise deemed to be defective because it "places the physician in an awkward position and infringes upon his or her professional responsibilities."[76] In the majority's judgment, this constitutes "State medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician."[77] All of this and the other information to be dispensed, under what the majority terms the "guise" of informed consent, is deemed *irrelevant* to such consent and, in the majority's judgment, advances no legitimate state interest.[78]

The Court thus, in effect, formulates a general rule proscribing state-mandated disclosure of the possible consequences of and alternatives to abortion on grounds that it will *ipso facto* seriously harm a patient. The majority's analysis seems to assume that physicians would present this information in an objectionable manner rather than in the normal course of pre-abortion counseling. And though the question of "bedside manner" is not without its complexities, the Court's newly fashioned rule contradicts the present course of modern tort law and public policy generally, which encourages the practice of full disclosure of potential dangers to life and the consequences of medical treatment decisions.[79] Yet, the Court chooses to ignore the wis-

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[76] *Id.* at 2180.

[77] *Id.*

[78] *Id.*

[79] *See generally* Appleton, *Doctors, Patients and the Constitution: A Theoretical Analysis of the Physician's Role in Private Reproductive Decisions*, 63 WASH. U.L.Q. 183, 207-208 (1985)(discussion of tort law theory holding disclosure of information concerning "contemplated medical procedure" critical to "patient's right to meaningful choice"); Katz, *Informed Consent-A Fairy Tale? Law's Vision*, 39 U. PITT. L. REV. 137, 149-74 (1977)(broad discussion of history and elements comprising doctrine of informed consent); Plante, *An Analysis of "Informed Consent"*, 36 FORDHAM L. REV. 639, 639 (1968)(informed consent theory is historically part of tort law and is not recent "doctrinal and procedural innovation"); Seidelson, *Medical Malpractice: Informed Consent Cases in "Full-Disclosure" Jurisdictions*, 4 RUT. L. REV. 309, 347 (1987)(suggesting shifting burden of proof to attending physician to prove informed consent in malpractice suits occurring in full disclosure jurisdictions); Note, *Who's Afraid of Informed Consent? An Affirmative Approach to the Medical Malpractice Crises*, 44 BROOKLYN L. REV. 241, 283 (1978)(benefits of adhering to doctrine of informed consent include right to self-determination, subsequent reduction in malpractice litigation and therapeutic effect on

dom of full disclosure, and instead building on language contained in *City of Akron v. Akron Center for Reproductive Health*, proceeds to define impermissible legislative motives in order to invalidate the requirements.[80]

Viewing the majority's holding as "primarily rhetorical,"[81] Justice White argues in dissent that the provision of "irrelevant" information about an abortion decision should not affect the Act's constitutionality so long as the information is verifiable and accurate. Somewhat sarcastically, he concludes that the majority's observation about irrelevancy "is itself an irrelevancy."[82]

As for enhancing a woman's "anxiety" and influencing her choice, Justice White notes that this consequence is itself an indication that the information is not only relevant, but "essential", and in the very nature of making an informed choice.[83] He continues:

> That the result of the provision of information may be that some women will forego abortions by no means suggests that providing the information is unconstitutional, for the ostensible objective of *Roe v. Wade* is not maximizing the number of abortions, but maximizing choice.[84]

He also cites the prior abortion decisions of the Court which hold that States may encourage women to choose childbirth

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patient).

[80] *Thornburgh*, 106 S. Ct. at 2179-80. The Court states that the Pennsylvania requirements are "poorly disguised elements of discouragement for the abortion decision." *Id.* at 2180. It continues *reductio ad absurdum:*

> That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose.

Id.

The extremity of this position "only emphasizes how far the United States Supreme Court in the *Roe* decision has deviated from the constitutional thinking of other highly regarded western constitutional courts, all of which recognize the legislature's authority to protect unborn human life through the normal democratic process." *See* Jonas and Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade—With Commentaries*, 9 J. MAR. J. PRAC. & PROC. 551 (1976)(discussion and analysis of West German abortion case setting forth policy of state obligation to protect developing fetus).

[81] *Thornburgh*, 106 S. Ct. at 2199.

[82] *Id.* at 2200.

[83] *Id.*

[84] *Id.*

rather than abortion.[85]

The majority's analysis of the informed consent provisions is, as in prior cases,[86] unduly centered on the impact of disclosure on physicians. *Roe* and its progeny do, of course, emphasize the "central role of the physician,"[87] but *Thornburgh* may mark the first time that a statutory provision has been struck down for placing a physician in an "awkward position". The lengths of the Court's solicitude for the physician only serve to magnify the stereotypical, but untenable premise of *Roe* and its progeny of the physician as fatherly counselor, a role that is divorced from reality.

> At least six out of ten abortions performed in the United States are performed in freestanding abortion clinics. Doctors in such clinics typically have a direct financial interest in seeing that abortions are performed as rapidly and efficiently as possible. Frequently, the only time the doctor sees the patient is when she is on the operating table awaiting the procedure.[88]

The reality of abortion practice is "fast-track, quick-fix [and] volume-for-profit."[89] Even commentators who support *Roe* admit that "[t]he data fail to support the model portrayed by the Court."[90]

Justice White could hardly be more caustic about the Court's physician-patient privacy analysis:

> This is nonsensical. I can concede that the Constitution extends its protection to certain zones of personal autonomy and privacy, *see Griswold v. Connecticut*, 381 U.S. 479, 502 (1965)(White, J., concurring in judgment), and I can understand, if not share, the notion that the protection may extend to a woman's decision regarding abortion. But I cannot concede

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[85] *Id.*

[86] *See* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Colautti v. Franklin, 439 U.S. 379 (1979) and the cases discussed in Appleton, *supra* note 79.

[87] Colautti v. Franklin, 439 U.S. 379, 381 (1979).

[88] Wood and Durham, *Counseling, Consulting and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. Rev. 783, 784.

[89] Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. Rev. 231, 244.

[90] Appleton, *supra* note 79, at 201-202 (1985); *see also*, Wardle, *supra* note 89, at 244-245 (discussion of unanticipated results of Roe v. Wade).

> the possibility that the Constitution provides more than minimal protection for the manner in which a physician practices his or her profession or for the "dialogues" in which he or she chooses to participate in the course of treating patients. I had thought it clear that regulation of the practice of medicine, like regulation of other professions and of economic affairs generally, was a matter peculiarly within the competence of legislatures, and that such regulation was subject to review only for rationality. *See, e.g. Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955).[91]

Doubting that the majority intends to undermine "the edifice of Post-New Deal Constitutional Law" concerning governmental regulation of professional and business relations, Justice White argues that the "obvious rationality" of the Pennsylvania policy must by definition defeat challenge.[92] He concludes:

> But if one assumes, as I do, that the majority is unwilling to commit itself to the implications of that part of its rhetoric which smacks of economic due process rights to physicians, it becomes obvious that the talk of "infringement of professional responsibility" is mere window-dressing for a holding that must stand or fall on other grounds.[93]

Although in one sense, the emphasis upon infringement of professional responsibility is, indeed, window-dressing, in yet another sense, it embodies the substance of the so-called "role-allocation" model of decision-making authority advanced by Professor Tribe in support of the abortion right.[94] The theory is that some decisions in society are best left to government and, others, to individuals or private groups. Because the right to privacy protects individuals against unwarranted governmental interference, questions involving individual reproductive decisions should be answered "not by what criteria should be used in making and reviewing properly governmental decisions about the distribution of public resources related to sexual reproduc-

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[91] *Thornburgh*, 106 S.Ct. at 2200 (White, J., dissenting).

[92] *Id.* at 2201.

[93] *Id.*

[94] Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

tion,"[95] but by "*who* should make reproductive decisions,"[96] that is, "as a matter of role-allocation between family and state."[97]

This approach to constitutional decision-making contains at best only a partial truth. It is true, for example, that even when the Court decides not to hear a case, its decision may influence the allocation of roles and power in society. As Justice Brandeis once said, "[t]he most important thing we do is not doing."[98] Likewise, a decision made by the Court after full hearing and review may allocate roles and power among individuals, groups or governments.

However much the role-allocation model represents one factor in the greater calculus of constitutional decision-making, its utility as a guide or compass is severely limited by a vacuum of value content that makes it susceptible to circular reasoning. Under the model, government would be circumscribed from interfering with an individual's choice in a constitutionally protected zone of privacy.[99] The limits of a zone of privacy cannot be drawn, however, without first finding that there is a constitutionally protected zone of privacy and then making a value judgment positioning any given interest within or without the protected zone. Constitutional decision-making, including decisions relating to role allocation, is thus an exercise in values. Role-allocation may advance any set of values. To the extent the values and the powers advanced are faithful to the values explicitly reflected and allocated in the Constitutional framework, as illuminated by its history and tradition, role-allocation is an appropriate factor to be considered. However, devoid of such understanding role-allocation can be used as a judicial mandate to restructure, reallocate and/or limit governmental or private authority. Moreover, the inordinate attention it gives to allocating power in Constitutional conflicts is frequently only a tangential, and unhealthy, substitute for what should be a central concern for traditional precepts reflected in the Bill of Rights, in the sep-

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[95] *Id.* at 44.

[96] *Id.*

[97] *Id.* at 43.

[98] A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 71 (1962).

[99] Tribe, *supra* note 94, at 46-47.

aration of powers or the other doctrines and allocations of decision-making authority explicitly reflected in the Constitution. Finally, were the Justices to assume a more expansive role as to who in society will (or should) make decisions in certain matters, the balance of power among the three coordinate branches of government would shift slowly, but definitely, toward judicial oligarchy because, as a practical matter, there would be little or no avenue of appeal from such decisions. As Justice Frankfurter warned:

> The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace.[100]

Far from avoiding "the fate of [the] earlier incarnation [of substantive due process] in American constitutional law," as its author claims it would, the role-allocation model, absent a strong sense of commitment to the values and allocation of power explicitly reflected in the Constitution would bring, in the cloak of neutral principles, the same "value-laden intervention"[101] that in the past has proved to be repulsive to our democratic system of government. At its worst, a "consciously role-allocating perspective" would encourage power-brokering by an unelected oligarchy that would be every bit as much the Council of Revision that the Framers rejected.

The role-allocation concept has surfaced in other recent cases involving medical treatment decisions. In the *Akron* case, Justice Powell bowed to the American Public Health Association Recommended Guide and the American College of Obstetricians and Gynecologists Standards for Obstetric-Gynecologic Services as sources of seeming absolute wisdom concerning medical treatment standards for abortion.[102] But, as Justice O'Connor pointed out in dissent in *Akron*, "[h]ealth-related factors that

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[100] American Fed'n of Labor v. American Sash Co., 335 U.S. 538, 557 (1949)(Frankfurter, J. concurring).

[101] Tribe, *supra* note 94, at 14.

[102] *Akron*, 462 U.S. at 436-37, 448 n.38, 449 n. 40-41, and 450 n.43.

may legitimately be considered by the State go well beyond what various medical organizations have to say about the *physical* safety of a particular procedure."[103]

Another more recent case reflecting the Court's philosophical bent toward "role-allocation" is the 1986 decision of *Bowen v. American Hospital Association.*[104] *Bowen* involved regulations issued by the Department of Health and Human Services providing for the investigation of complaints about discriminatory medical treatment of handicapped infants. Although the Court (in a plurality opinion written by Justice Stevens) treated the issue as solely one of statutory interpretation and administrative law — without constitutional implications — it nevertheless adopted a role-allocation approach, suggesting that in decisions involving medical treatment of handicapped infants, government must sustain a heavy burden to justify regulations permitting investigation and review of medical treatment decisions made by parents and physicians.[105] Although Justice Stevens' plurality

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[103] *Id.* at 467.

[104] 106 S. Ct. 2101 (1986).

[105] *Id.* a 2121-23. The plurality opinion in *Bowen* is remarkable reading in view of the relatively straightforward issue of statutory interpretation appealed from in the court of appeals. The latter court, relying on its prior opinion in United States v. University Hosp. 729 F.2d 144 (2d Cir. 1984), had summarily affirmed the district court ruling in American Hospital Association v. Heckler, 585 F. Supp. 541 (S.D.N.Y. 1984). The Supreme Court plurality agreed that it was thus reviewing the reasoning in the earlier *University Hosp.* case which involved the issue of whether section 504 of the Rehabilitation Act relating to discrimination against the handicapped applied to medical treatment decisions affecting handicapped infants. *Bowen*, 106 S. Ct. at 2109. The plurality opinion largely assumed section 504 included handicapped infants within its coverage, but proceeded to invalidate the Department of Health and Human Services regulations as arbitrary and capricious on grounds that the Secretary had no factual basis to conclude that *hospitals* had withheld medical treatment based on handicap. *Id.* at 2111-2117. This was because in the record relied on by the Secretary, treatment was withheld because of a lack of *parental* consent to such treatment which, in the plurality's view, was *ipso facto*, not discrimination by virtue of handicap. *Id.* at 2118-20. The plurality stressed that state law vests decisional authority in the parents and refused to recognize that parents and hospitals (or their employees) might *jointly* decide to withhold treatment. The plurality also refused to uphold the regulations on grounds that decisions—however made—were in fact made to deny treatment. *Id.* at 2112-23.

Justice White in dissent accused the plurality of mischaracterizing the judgment below which, in his words, "incorrectly resolv[es] an issue that was not fully addressed by the parties, gives no guidance to the Secretary or the other parties as to the proper construction of the governing statute and fails adequately to explain the precise scope of the holding or how that holding is supported under the plurality's chosen rationale." *Id.*

opinion is written on ostensibly narrow grounds of administrative law, the broader import remains clear. In the words of one commentator:

> Whatever the ultimate determination, the plurality's decision in *American Hospital Association* at least determines the identity of the decision makers: parents, medical personnel, and the states. The federal government [except, apparently, its courts] will be excluded. While this solution cannot resolve the ethical and moral dilemmas presented by these situations, it will at least ensure that the debate proceeds upon acknowledged and sanctioned premises among those most concerned.[106]

In many respects, however, the plurality's reasoning begs the question with its emphasis on *who* should decide. The values inherent in the fifth and fourteenth amendment's protection of life ought to permit government to prescribe medical procedures to protect helpless infants from injury or death visited upon them by unwitting or emotionally distraught parents, and/or physicians who may or may not have a particular interest in a medical treatment outcome.

The ultimate question, then, assuming a given subject is appropriate at all for judicial decision and intervention, is not nec-

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at 2132. Justice White would have upheld the regulations on grounds that "decisions to withhold treatment from such infants are in fact being made" and that "the parental consent decision does not occur in a vacuum." *Id.* at 2128-29. Justice White reasoned:

> In fact, the doctors (directly) and the hospital (indirectly) in most cases participate in the formulation of the final parental decision and in many cases substantially influence that decision. Consequently, discrimination against a handicapped infant may assume guises other than the outright refusal to treat once parental consent has been given. Discrimination may occur when a doctor encourages or fails to discourage a parental decision to refuse consent to treatment for a handicapped child when the doctor would discourage or actually oppose a parental decision to refuse consent to the same treatment for a nonhandicapped child. Or discrimination may occur when a doctor makes a discriminatory treatment recommendation that the parents simply follow. Alternatively, discrimination may result from a hospital's explicit laissez-faire attitude about this type of discrimination on the part of doctors.
>
> Contrary to the plurality's constrained view of the Secretary's justification for the regulations, the stated basis for those regulations reveals that the Secretary was cognizant of this more elusive discrimination.

Id. at 2129 (emphasis supplied; footnote omitted).

[106] Note, *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 1, 294-95 (1986).

essarily what and to whom roles should be allocated, but rather *what values are explicitly reflected in the constitutional framework and how does the Constitution indicate they should be implemented.*[107] Role allocation may be helpful in the implementation of value choices, but it should not be allowed to veil or otherwise confuse the larger, and more important, question of which values should prevail.

2. *Reporting and Determination of Viability*: For second and third trimester abortions, the Pennsylvania statute requires that physicians report the basis of a determination that the child to be aborted is not viable. It also requires the filing of a report on each abortion performed. The required report does not disclose the woman's identity.[108] It is available for public inspection and copying,[109] but "in a form which will not lead to the disclosure of the identity of any person filing a report."[110] Additional required

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[107] Any decision by government allocating roles to be played in matters affecting individual or social interests is essentially a political decision which, in a democratic society, should rest primarily with the legislative branch. In those decisions which find their way to the courts, the Constitution should be interpreted not as a mandate to change or impose new values, but rather as a charter for restrained elaboration of the values and commands expressed in the text of the Constitution and in light of its history and tradition.

[108] The report required by section 3214(a) of the Act provided for the following information:

(1) physician and facility performing abortion, including referring physician;
(2) political subdivision and state of the woman;
(3) woman's age, race, and marital status;
(4) number of prior pregnancies;
(5) date of woman's last menstrual period and probable gestation age of child;
(6) type of abortion procedure and date of abortion;
(7) complications
(8) viability information;
(9) length and weight of aborted child;
(10) information with respect to medical emergency;
(11) date of medical consultation;
(12) date pregnancy determined;
(13) certain information relating to abortions done after viability;
(14) financial information as to payment for abortion.

[109] Section 3214(e)(4) provides that a person who discloses information from the reports, other than that disclosure authorized by section 3214(e) is guilty of a misdemeanor under Pennsylvania law.

[110] Section 3214(e)(2) of the Act. The physician's name was to be replaced by a number and the identity of the physician was to be a confidential record of the department. *Id.*

reports on complications are also open to public inspection and copying.

The majority holds that both the scope of the information to be reported and its public availability "belie any assertion"[111] that Pennsylvania is seeking to advance any legitimate interest. The majority acknowledges that although its decision in *Danforth* permitted recordkeeping and reporting that are "reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy,"[112] the information required by Pennsylvania goes beyond health-related interests. The majority concludes that "[i]dentification is the obvious purpose of these extreme reporting requirements,"[113] and such identification would dull the exercise of protected constitutional rights.[114] The public availability of the records, plus the lack of defined limits as to the use of the information, "raise the spectre of public exposure and harassment of women who choose to exercise their personal, intensely private right, with their physician, to end pregnancy."[115]

Justice White attacks this ruling as "extraordinary". He accuses the majority of resorting "to the handy, but mistaken, solution of substituting its own view of the facts"[116] on the question of identification. The majority's "fact finding" is deemed suspect because Rule 52(a) of the Federal Rules of Civil Procedure enjoins appellate courts to defer to a trial court's findings of fact. In this case, the trial court upheld the reporting requirements upon a factual finding that they raised no question of public exposure or harrassment. Justice White criticizes the Court's summary reversal (on a very preliminary record) of the trial court's determination. He also disputes the Court's specific "findings of fact," concluding it "impossible" that a particular patient could be identified by anyone who did not already know that the woman had been pregnant and had obtained an

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[111] *Thornburgh*, 106 S. Ct. at 2181.

[112] *Id.*, *quoting* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 80 (1976).

[113] *Id.* at 2182.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 2202.

abortion.

Justice O'Connor reinforces this point, arguing that the Court's "fact" finding "is simply another consequence of the Court's determination to prevent the parties from developing the facts."[117] Although she doubts there is any substantial threat of identification on the face of the statute, she would leave this question for the district court to determine on remand.

3. *Standard of Care for Postviability Abortions and Second Physician Requirement.* The Pennsylvania statute requires a degree of care for post-viability abortion equivalent to that for "any unborn child intended to be born and not aborted".[118] It also requires an abortion technique that would permit an unborn child to be aborted alive unless the technique presented a "significantly greater" medical risk to the life and health of the pregnant woman.[119] It further requires that a second physician be present when viability is possible.

The majority finds fault with the statute's "significantly greater medical risk" standard in that, in its view, it poses a "trade-off" between the pregnant woman and the fetus, causing the mother to bear an impermissibly increased medical risk.[120] On this point, the *Thornburgh* majority openly chides the Pennsylvania Legislature:

> It is clear that the Pennsylvania Legislature knows how to provide a medical-emergency exception when it chooses to do so. It defined "medical emergency" in general terms in Section 3203, and it specifically provided a medical-emergency exception with respect to informational requirements, Section 3205(b); for parental consent, Section 3206; for post (first)-trimester hospitalization, Section 3209; and for a public official's issuance of an order for an abortion without the express voluntary consent of the woman, Section 3215(f). We necessarily conclude that the legislature's failure to provide a medical-emergency exception in Section 3210(c) was intentional.[121]

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[117] *Id.* at 2216.

[118] *Id.* (referring to section 3210(b) of the Act.)

[119] *Id.*

[120] *Id.* at 2183 (citing Colautti v. Franklin, 439 U.S. 379, 379-401 (1979)).

[121] *Id.* at 2184.

Justice White labels the Court's analysis of the standard of care as "linguistic nit-picking" and a "wholly unreasonable interpretation of the statute."[122]

> The majority adopts the Court of Appeals' view that the statute's use of the term "significantly" renders it "not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus." *Ante*, at 20 (quoting 737 F.2d 283, 300 (1984)). The term "significant" in this context, however, is most naturally read as synonymous with the terms "meaningful", "cognizable," "appreciable," or "non-negligible." That is, the statute requires only that the risk be a real and identifiable one. Surely, if the State's interest in preserving the life of a viable fetus is, as *Roe* purported to recognize, a compelling one, the State is at the very least entitled to demand that the interest not be subordinated to a purported maternal health risk that is in fact wholly insubstantial. The statute, on its face, demands no more than this of a doctor performing an abortion of a viable fetus.[123]

He further disputes the Court's reliance on *Colautti* as precedent for a no trade-off rule. In his view, nothing in *Colautti* compels such a rule and even *Roe v. Wade*, which recognized a compelling state interest in preserving the life of a viable fetus, would not sanction such a rule.

> The Court now holds that this compelling interest cannot justify *any* regulation that imposes a quantifiable medical risk upon the pregnant woman who seeks to abort a viable fetus: if attempting to save the fetus imposes any additional risk of injury to the woman, she must be permitted to kill it. This holding hardly accords with the usual understanding of the term "compelling interest," which we have used to describe those governmental interests that are so weighty as to justify substantial and ordinarily impermissible impositions on the individual — impositions that, I had thought, could include the infliction of some degree of risk of physical harm. The most obvious illustration of this principle may be found in the opinion of the elder Justice Harlan in *Jacobson v. Massachusetts*,

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[122] *Id.* at 2203.
[123] *Id.*

> 197 U.S. 11, 29 (1905): "The liberty secured by the fourteenth amendment . . . consists, in part, in the right of a person to live and work where he will, *Allgeyer v. Louisiana*, 165 U.S. 578; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests . . . to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense."
> . . .If, as I believe these examples demonstrate, a compelling state interest may justify the imposition of some physical danger upon an individual, and if, as the Court has held, the State has a compelling interest in the preservation of the life of a viable fetus, I find the majority's unwillingness to tolerate the imposition of *any* nonnegligible risk of injury to a pregnant woman in order to protect the life of her viable fetus in the course of an abortion baffling.[124]

The majority also proceeds to invalidate the Act's second physician requirement because it does not contain, as did a similar requirement in the Missouri statute upheld in *Planned Parenthood Association v. Ashcroft*,[125] an express exception in cases where delayed arrival of the second physician might endanger the health of the mother. Justice White points out that the majority's analysis "brushes aside"[126] the statutory good faith defense. Section 3210(a) plainly excuses a physician for violating the second physician requirement of section 3210(c) if "he had concluded in good faith, in his best medical judgment" that the abortion without a second physician was "necessary to preserve maternal life or health". Justice White writes:

> The Court's rejection of this construction is based on its conclusion that the statutory language "does not relate to the second-physician requirement" and that "its words are not words of emergency." *Ante*, at 22. This "relates" to any charge that a doctor violated one of the requirements of the section in which it appears, and the second-physician requirement is imposed by that section. The defense thus quite evidently "relates" to the second-physician requirement. True, the "words"

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[124] *Id.* at 2203-04.
[125] 462 U.S. 476 (1983).
[126] *Thornburgh*, 106 S. Ct. at 2205 (White, J., dissenting).

> of the defense are not "words of emergency," but words of necessity. Why this should make a difference is unclear: a defense of medical necessity is fully as protective of the interests of the pregnant woman as a defense of "emergency." The Court falls back, *ibid.*, on the notion that the legislature "knows how to provide a medical-emergency exception when it chooses to do so." No doubt. But the legislature obviously also "knows how" to provide a medical necessity exception, and it has done so. Why this exception is insufficient is unexplained and inexplicable.[127]

Justice White concludes with the sarcastic observation that the Court's guiding principle must be "that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs."[128]

II. The Broader Constitutional Issues in *Thornburgh*

Had the debate in *Thornburgh* been limited to the specific provisions of the Pennsylvania statutes, the opinions, though spirited and colorful, would be little more significant than the opinions in other cases involving important public issues. *Thornburgh* is set apart, however, even from the Court's prior decisions on abortion, because there emerges an intense debate between Justices White and Stevens about the proper limits of the power and authority of the Court as an institution, and, as a corollary, the extent and reach of the doctrine of *stare decisis*.[129] Moreover, for the first time since *Roe*, clearly defined and thorough alternate constitutional theories are presented by both Justices White and O'Connor outlining grounds under which *Roe* might be re-examined. The majority opinion in *Bowers v. Hardwick* further illuminates the debate surrounding these issues. This article now proceeds to an examination of these matters.

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[127] *Id.*

[128] *Id.*

[129] *Id.* at 2185-90 (Stevens, J., concurring), 2192-98 (White, J., dissenting). *Stare decisis* has, since the *Akron* decision, served as a secondary legal argument underpinning Roe v. Wade. *See Akron*, 462 U.S. at 419-20.

A. *Institutional Limits*

The *Thornburgh* dissenters express grave concern that the Court's abortion decisions have "lured judges into 'roaming at large in the constitutional field.' "[130] The implied danger is, of course, that "five old men [or women]" have usurped the democratic prerogative. Justice White, who initially objected in his dissent in *Roe*, elaborates in greater detail and with more vigor the position that abortion, like other hotly contested moral and political issues, is most appropriately resolved not by the courts, but "by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted."[131] White categorically rejects the notion that the people have woven the values and principles undergirding *Roe* into the Constitution: "I believe it is clear that the people have never — not in 1787, 1791, 1868, or at any time since — done any such thing. I would return the issue to the people by overruling *Roe v. Wade*."[132]

White's position centers on the values implicit in *Roe*, suggesting that the Court has not faithfully adhered to what he calls "the rule of law" in interpreting those values as part of the judicial process. A threshhold consideration is the judicial rule of *stare decisis*. This rule was invoked by Justice Powell in the *Akron* case as a central basis for reaffirming *Roe v. Wade*. Justice Powell wrote:

> [T]he doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.
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> . . .
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> There are especially compelling reasons for adhering to *stare*

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[130] *Thornburgh*, 106 S. Ct. at 2192 (Burger, C. J., dissenting), 2195 (White, J., dissenting)(quoting Griswold v. Connecticut, 381 U.S. 479, 504 (1965)(Harlan, J., concurring).

[131] *Thornburgh*, 106 S. Ct. at 2197. In *Doe v. Bolton*, Justice White characterized the Court's action as "an exercise of raw judicial power . . . an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court." Doe v. Bolton, 410 U.S. 179, 222 (1973). There, he also wrote that abortion is an issue over which "reasonable men may easily and heatedly differ", and, therefore, should be left to "the political processes the people have devised to govern their affairs." *Id.*

[132] *Thornburgh*, 106 S. Ct. at 2198.

> *decisis* in applying the principles of *Roe v. Wade*. That case was considered with special care. It was first argued during the 1971 Term, and reargued — with extensive briefing — the following Term. The decision was joined by The Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.[133]

In *Thornburgh*, Justice White directly confronts this view of *stare decisis*, contending that it does not constrain the Court from reexamining and reevaluating *Roe*.

> The rule of *stare decisis* is essential if case-by-case judicial decisionmaking is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results. But *stare decisis* is not the only constraint upon judicial decisionmaking. Cases — like this one — that involve our assumed power to set aside on grounds of unconstitutionality a State or federal statute representing the democratically expressed will of the people call other considerations into play. Because the Constitution itself is ordained and established by the people of the United States, constitutional adjudication by this Court does not, in theory at any rate, frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own choosing. But decisions that find in the Constitution principles or values that cannot fairly be read into the document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken.[134]

Following the thread of Justice O'Connor's dissent in *Akron*,

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[133] *City of Akron v. Akron Center for Reproduction Health*, 462 U.S. at 419-20, 420 n.1. (1983).

[134] *Thornburgh*, 106 S. Ct. at 2192-93 (White, J., dissenting).

where she noted that *stare decisis* is not rigidly applied in cases involving constitutional issues,[135] Justice White points to the Court's past corrections of misadventures in Constitutional decision-making.

> *Stare decisis* did not stand in the way of the Justices who, in the late 1930's swept away constitutional doctrines that had placed unwarranted restrictions on the power of the State and Federal Governments to enact social and economic legislation, *see United States v. Darby*, 312 U.S. 100 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Nor did *stare decisis* deter a different set of Justices, some fifteen years later, from rejecting the theretofore prevailing view that the fourteenth amendment permitted the States to maintain the system of racial segregation. *Brown v. Board of Education*, 347 U.S. 483 (1954). In both instances, history has been far kinder to those who departed from the precedent than to those who would have blindly followed the rule of *stare decisis*. And only last term, the author of today's majority opinion reminded us once again that "when it has become apparent that a prior decision has departed understanding" of the Constitution, that decision must be overruled. *Garcia v. San Antonio Metropolitan Transit Authority*. ____ U.S. ____, ____ (1985).[136]

Justice Stevens debates Justice White on this point, admitting that he writes "in order to ensure that the clarity of certain fundamental propositions not be obscured by [White's] forceful rhetoric."[137] His first objection relates to *stare decisis*. Stevens criticizes White's failure to distinguish his participation in the majorities that decided the *Roe* precursors, *Griswold v. Connecticut*,[138] *Eisenstadt v. Baird*[139] and *Carey v. Population Services*

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[135] *Akron*, 462 U.S. at 459-59.

[136] *Thornburgh*, 106 S. Ct. at 2193. Justice O'Connor reserves opinion on the question of overruling *Roe* because "Pennsylvania has not asked the Court to reconsider or overrule [it]." *Id.* at 2213. In referring to the Court's disposition of procedural issues, she expresses concern about the "institutionally debilitating effect" of abortion cases on the Court's ability to decide heretofore uncontroversial legal doctrines. *Id.* at 2207. She states, "Today's decision . . . makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Id.* at 2206.

[137] *Id.* at 2185.

[138] 381 U.S. 479 (1965).

International.[140] In Justice Stevens' view, it is self-contradictory for White to sustain a woman's "liberty" interest in the use of contraceptives while denying a liberty interest in a decision made a few days after conception not to bear a child. Justice Stevens implies that overruling *Roe* would require overruling *Griswold, Eisenstadt* and *Carey* as well, thereby threatening the values implicit in *stare decisis* which, he argues, cannot be so easily dismissed. "There is the strong public interest in stability, in the orderly conduct of our affairs, that is served by a consistent course of constitutional adjudication."[141]

Justice White admits that abortion involves childbearing, as did *Griswold, Eisenstadt* and *Carey*, but unlike those cases, it also involves the destruction of the fetus, rendering it different in kind from a decision not to conceive in the first place. In this sense, the individual is not "isolated in her privacy."[142] The argument continues by analogy: just as the fundamental right of parents to raise their children (recognized in *Moore*[143], *Pierce*[144] and *Meyer*[145]) does not proscribe the state from protecting children from assaults by their parents, so too the fundamental right of persons in childbearing does not proscribe the state from protecting the potential life represented by the fetus.[146] *Roe*, therefore, would fall, but the earlier cases would stand, and the threat, if any, to *stare decisis*, or the values it represents, would be limited.

Justice Stevens also objects to White's characterization of the values advanced by *Roe*. He defends *Roe* by urging that matters involving childbearing should rest primarily "in the private sector of our society."[147] Constitutional proscriptions against government intrusion in these matters are, in his view, supported by history and tradition: "The lawmakers who placed

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[139] 405 U.S. 438 (1972).

[140] 431 U.S. 678 (1977).

[141] *Thornburgh*, 106 S. Ct. at 2185.

[142] *Id.* at 2189.

[143] 431 U.S. 494 (1977).

[144] 268 U.S. 510 (1925).

[145] 262 U.S. 390 (1923).

[146] *Thornburgh*, 106 S. Ct. at 2195-96, n.2.

[147] *Id.* at 2189.

a special premium on the protection of individual liberty have recognized that certain values are more important than the will of a transient majority.[148] Quoting from *West Virginia v. Barnette*[149], he suggests that "[t]he very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[150] Unfortunately, this argumentation begs the question. Justice Stevens' assertion that the Bill of Rights withdraws certain subjects from majority determination is true enough. Clearly the right of conscience enshrined in the First Amendment, which was the context of the *Barnette* case, is not subject to majority rule. But the applicability of this argument to abortion is problematic. The difficulty lies in the failure of the Constitution to delineate an explicit privacy right that would clearly and unequivocally preclude states from proscribing or prescribing the terms of abortion.

Justice Stevens pays lip service to the strict scrutiny — compelling state interest standard as the governing standard in cases involving fundamental interests like childbearing, but his opinion tends to follow the role-allocation model. Underlying his beliefs that abortion involves a fundamental right and that the state interest in protecting the fetus is not compelling during most of pregnancy is a predisposition to allocate pre- and post-conception childbearing decisions to the individual. Indeed, he criticizes Justice White for being influenced "as much by his own value preferences *as by his view about the proper allocation of decisionmaking responsibilities between the individual and the state*," role allocation apparently being the talisman for Justice Stevens.

If the role allocation rationale (as a refinement of *Roe*), were to command a majority of the Court, it is predictable that *Roe's* failure would have bred an even more expansive constitutional doctrine that would permit even greater private choice in matters relating to childbearing and medical treatment decisions,

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[148] *Id.* at 2190.

[149] 319 U.S. 624, 638 (1943).

[150] *Thornburgh*, 106 S. Ct. at 2190 n.12.

with possible future impacts on infanticide, suicide and euthanasia.

Justice White would limit the Court's recognition of fundamental rights in constitutional adjudication to those "values and principles that are implicit (and explicit) in the structures of rights and institutions that the people have themselves created."[151]

> [T]he hallmark of a correct decision of constitutional law is that it rests on principles selected by the people through their Constitution, and not merely on the personal philosophies, be they libertarian or authoritarian, of the judges of the majority. While constitutional adjudication involves judgments of value, it remains the case that some values are indeed "extraconstitutional," in that they have no roots in the Constitution that the people have chosen. The Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), was wrong because it rested on the Court's belief that the liberty to engage in a trade or occupation without governmental regulation was somehow fundamental—an assessment of value that was unsupported by the Constitution.[152]

By denominating abortion as a fundamental liberty, he complains that the majority is engaging "not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences."[153]

The crux of the matter is whether the values reflected in *Roe* are rooted in the will of the people as expressed in the Constitution and society's shared consensus of the meaning of that document or whether they have some other origin. The durability of *Roe* also depends upon ultimate acceptance in the legal community and by society generally of the values it stands for. It is on this level that *Roe* is vulnerable. Not unlike the *Dred Scott* decision of the last century,[154] *Roe* expresses a view of human life that denies the existence, at least for legal purposes,

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[151] *Id.* at 2197 n.5.

[152] *Id.* at 2197-98 n.5.

[153] *Id.* at 2196. Justice White made a similar argument in his dissent in *Roe v. Wade*, 410 U.S. at 222.

[154] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

of an otherwise human being. Like *Dred Scott*, which found support primarily in the South, *Roe* commands only limited active community acceptance and support, largely in pro-ERA, feminist and other similar sub-communities, with much of the populous indifferent or apathetic. And like *Dred Scott*, the principal failure in the Court's adjudication is essentially a jurisprudential one in which the Court has been unable to justify its reasoning in *Roe* using either the natural law tradition or the wording of the Constitution itself.[155] For having failed to do so, *Roe* remains as one of the most, if not *the* most, criticized case in Supreme Court history. This criticism is intensified in *Thornburgh* among the peers responsible for the ruling. The dissents magnify the jurisprudential failure of *Roe* and call into question the legitimacy of that decision. If the *Roe* majority is not careful in its handling of the issue, *Roe's* devastating inadequacy as a precedent may soon be viewed as an unacceptable liability to a judiciary that is so largely dependent upon intellectual integrity for the authority of its judgments.[156]

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[155] *See generally* A. Cox, *supra* note 1. As Dean Ely has stated, the Court "is under an obligation to trace its premises to the charter from which it derives its authority." Ely, *supra* note 6, at 949. It is interesting to note that the *Dred Scott* decision was the subject of great debate in its time, leading to the Civil War. It was a central issue in the Lincoln-Douglas debates:

> 'I yield obedience,' Douglas said, 'to the decisions of that Court — to the final determination of the highest judicial tribunal known to our Constitution.' To this Lincoln countered by deriding the notion that a decision of the Supreme Court is a 'Thus saith the Lord.' 'The Court,' he said, 'can be wrong. There is nothing sacred about the Court's decisions. Men may properly differ with them.'

A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 259 (2d ed. 1986).

[156] *See* Note, *supra* note 106, at 209. The authors of the Note make the following comment:

> Thus, *Thornburgh's* greatest significance may be in the warning held out by its dissenters. The narrow margin of the decision and the vehemence of the dissents suggest that sentiment on the Court may be turning against *Roe v. Wade*. If the Court continues to interpret *Roe v. Wade* so broadly that every information requirement becomes an infringement of the abortion right, *Roe v. Wade's* supporters on the Court may be undermining the decision by encouraging needless discontent. In order to preserve the fundamental right of access to abortion, the Court should refrain from applying *Roe v. Wade* in so sweeping a fashion that it invalidates regulations that only incidentally infringe that right.

Id. at 209-10.

B. *The Dissenters' Arguments to Reverse Roe v. Wade*

Thornburgh provides the occasion for Justices White and O'Connor to elaborate more fully on the principles of their disagreement with *Roe v. Wade* and theories to overrule or refine it. No doubt the suggestion and argument of the Solicitor General that *Roe* be reversed prompts Justice White to state that he would overrule *Roe* and to provide a complete exposition of his reasons for doing so. Justice O'Connor explicitly avoids expressing an opinion as to whether *Roe* should be overruled,[157] but elaborates further on her *Akron* dissent,[158] calling for a less stringent level of judicial review of state abortion regulation that does not impose an absolute obstacle or severe limitation on the abortion decision.[159] The views of Justices White and O'Connor are considered in greater detail below.

1. *The Legal Status of the Fetus and Its Affect on Abortion Rights.* For the first time since *Roe v. Wade*, the legal status of the fetus is discussed in considerable detail. In *Roe*, the Court rejected the argument that the fetus was a "person" within the language and meaning of the fourteenth amendment,[160] conceding that personhood status for the fetus would guarantee its right to life[161]. The *Thornburgh* majority avoids

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[157] *Thornburgh*, 106 S. Ct. at 2207. Since the parties did not request it, Justice O'Connor does not express an opinion as to whether Roe v. Wade should be overruled. *Id.* Contrary to speculation in the media, it is not at all clear that Justice O'Connor would vote to overrule *Roe*. Although she clearly stated in the *Akron* case that she would recognize that the state interest in potential life is a compelling one at *all* stages of pregnancy, she nevertheless would give heightened scrutiny to any claim that a state has imposed an "undue burden" on the abortion decision. Under this analysis, some abortions might conceivably be constitutionally protected. Whether or not a state statute of the pre-*Roe* variety which imposed criminal penalties on virtually all abortions would withstand heightened scrutiny is open to question.

[158] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

[159] *Thornburgh*, 106 S. Ct. at 2207.

[160] *See Roe*, 410 U.S. at 156-52 (Constitution does not indicate that " person" has any prenatal application).

[161] *Id.* at 156-57. The Courts' opinion in *Roe* did not contain an extensive analysis of this question. It relied primarily on the historical argument that in the 19th century — when the fourteenth amendment was adopted and ratified — prevailing legal abortion practices were far freer than in the time *Roe* was decided. *Id.* at 157. *See also* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1284 (1975)(explaining constitutional definition of person).

Professor Destro has written that the Constitution does not define the word "per-

discussion of this question, but Justices White and Stevens engage in an extensive colloquy on the status of the fetus and the level of protection an unborn child deserves from society. This subject is relevant to two aspects of the constitutional rationale underlying *Roe:* (1) whether the abortion right is "fundamental" under the fourteenth amendment's Due Process Clause and (2) whether the state's interest in protecting life (or potential life) is compelling from conception or at some other point in pregnancy.

Justice White points out that even *Roe* distinguished prior right to privacy cases involving childbearing and child raising from the abortion setting because the latter involved the destruction of the fetus.[162] In his view, it is the very existence of the fetus as a separate entity with "life" or a "potential life" that prevents abortion from being brought within the full protection of the privacy right:

> However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being. Given that the continued existence and development—that is to say the *life*—of such an entity are so directly at stake in the woman's decision whether or not to terminate her pregnancy, that decision must be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy. Accordingly, the decisions cited by the Court both in *Roe* and in its opinion today as precedent for the fundamental nature of the liberty to choose abortion do not, even if all are accepted as

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son" and that its use there depends on the context. With respect to its usage in the fourteenth amendment, he opines that "[i]f the constitutional usage of person is too inflexible to include the unborn, it cannot reasonably be thought flexible enough to include a corporation. Yet it is a fact that the concept of corporate personhood was accepted by the Court without argument in Santa Clara County v. Southern Pacific Railroad Co., 118 U.S. 394 (1886)." Destro, *supra*, at 1284.

[162] *Thornburgh*, 106 S. Ct. at 2195.

valid, dictate the Court's classification.[163]

This argument does not, of course, seek to establish the fetus as a person within the meaning of the fourteenth amendment. It does, however, acknowledge that the fetus is a present, living entity, a fact that isolates abortion from the Court's precedents dealing with personal or family privacy and autonomy. This presence, if you will, of *life* in the fetus, recognized as *potential life* in *Roe,* removes abortion from being strictly a personal decision affecting only the woman, because there is a societal interest in another individually distinct potential life as well. The protection otherwise afforded by the right of privacy to the abortion decision is thus, at the very least, diminished.[164]

The presence of life (or potential life) in the fetus triggers a state interest that was not activated in the Court's earlier right to privacy decisions. This state interest is grounded in the fundamentally *human* rights protected by the fifth and fourteenth amendments.[165] The "life" that is protected by due process of law is human life. And, notwithstanding the Court's determination that the potential life represented by the fetus may not be a person, "in the whole sense",[166] it is nevertheless the case that a primary interest protected by the Constitution's Due Process Clauses is the preservation of the life of a member (or members) of the species, *homo sapiens.* To assert, then, that this interest is less than compelling at any stage of pregnancy involves a value choice that cheapens the protection afforded by the Clauses.

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[163] *Id.* at 2195-96.

[164] "[T]he ultimate question is not when 'life' begins, but, rather, whether under the Constitution states may extend to the fetus some of the protection it extends to fully born members of society." Wardle, *supra* note 89, at 260. The question is magnified by the legal protections of prenatal life afforded by the states in other areas of laws, including torts, crimes, inheritance, trusts, insurance, welfare, civil rights, public health and child abuse. *See* Callahan, *How Technology is Reframing the Abortion Debate,* 16 HASTINGS CENTER REPORT 33, 40 (1986); *see also,* Wardle, *supra* at 252-254, and the supporting cases, statutes and law review articles cited therein and Note, *Taking Roe to the Limits: Treating Viable Feticide as Murder,* 17 IND. L. REV. 1119 (1984).

[165] Destro, *supra* note 161.

[166] *Roe* is in this sense similar to the Court's decision in Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), in that both decisions determined that human beings were not persons entitled to the same legal protection as other persons.

Justice Stevens acknowledges that there are state interests in protecting what he calls the "embryo":

> I should think it obvious that the state's interest in the protection of an embryo—even if that interest is defined as "protecting those who will be citizens,"—increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day.[167]

However, as noted earlier, Stevens chides Justice White for betraying the principles of *Griswold, Eisenstadt* and *Carey,* which he argues (quoting from Justice White's opinions), stand for "the freedom from unwarranted governmental intrusion into individual decisions in matters of childbearing."[168] Stevens' criticism rests on two grounds, both of which relate to the status of the fetus: (1) Justice White's apparent willingness to accept that a decision made a few days after conception not to bear a child is *less* fundamental than a comparable decision made before conception and (2) Justice White's assertion that the governmental interest in protecting fetal life "is equally compelling during the entire period from the moment of conception until the moment of birth."[169] With respect to the latter, Justice Stevens argues:

> For, unless the religious view that a fetus is a "person" is adopted—a view Justice White refuses to embrace, *ibid.*—there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures. And if distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection—even though

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[167] *Thornburgh,* 106 S. Ct. at 2188. This is the first time that anyone on the Supreme Court has suggested that the state interest in potential life may become compelling if it is shown that the fetus feels pain or experiences pleasure or reacts to its surroundings. Justice Stevens is probably not suggesting that the "viability" standard be abandoned in favor of previability evidence of pain, pleasure or other reaction. With the dramatic revolution in fetology, a concession of this magnitude would contain the seeds of further erosion of *Roe v. Wade.*

[168] *Id.* at 2186.

[169] *Id.* at 2188.

> the fetus represents one of "those who will be citizens"—it seems to me quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth. Recognition of this distinction is supported not only by logic, but also by history and by our shared experiences.[170]

For Justice White, the activation of the compelling state interest in *life* or *potential life* at the beginning of pregnancy is no less arbitrary than the Court's decision to activate that interest after "viability."[171] He dismisses Justice Stevens' attempt to paint him into a "religious" position:

> [I]t is self-evident that neither the legislative decision to assert a state interest in fetal life before viability nor the judicial decision to recognize that interest as compelling constitutes an impermissible "religious" decision merely because it coincides with the belief of one or more religions. Certainly the fact that prohibition of murder coincides with one of the Ten Commandments does not render a State's interest in its murder statutes less than compelling, nor are legislative and judicial decisions concerning the use of the death penalty tainted by their correspondence to varying religious views on that subject. The simple, and perhaps unfortunate, fact of the matter is that in determining whether to assert an interest in fetal life, a State cannot avoid taking a position that will correspond to some religious beliefs and contradict others. The same is true to some extent with respect to the choice this Court faces in characterizing an asserted state interest in fetal life, for denying that such an interest is a "compelling" one necessarily entails a negative resolution of the "religious" issue of the humanity of the fetus, whereas accepting the State's interest as compelling reflects at least tolerance for a state decision that is congruent with the equally "religious" position that human life begins at conception. Faced with such a decision, the most appropriate course of action for the Court is to defer to a legislative resolution of the issue: in other words, if a state legislature asserts an interest in protecting fetal life, I can see no satisfac-

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[170] *Id.*

[171] *Id.* at 2196-97.

tory basis for *denying* that it is compelling.[172]

Justices White and Stevens are at an obvious impasse and yet, their extended discussion about the legal status of the fetus contains a more direct approach to the subject than has appeared in the Court's prior abortion opinions. Justice White goes so far to advance the view that life (not just potential life) is present in the fetus. Justice Stevens admits that the States' interest in protecting would-be citizens increases with the "organism's" capacity to feel pain, experience pleasure or survive.

Justice White's acknowledgement of the presence of *life* in the fetus is but a short semantic step from treating the fetus as a person. This much may be seen in a similar decision of the Federal Constitutional Court of the Federal Republic of Germany (West Germany) decided on February 25, 1975,[173] in which the abortion statutes of the Federal State of Baden-Wurttenberg were interpreted. In that case, Article 2, Paragraph 2, Sentence 1 of the Basic Law, West Germany's constitutional charter, provided:

> Everyone has the right to life (Jeder hat das Recht anf Leben)[174].

The issue was whether the term "everyone" included the unborn. The Federal Constitutional Court found that life, in terms of the historical existence of a human individual, exists from the 14th day after conception and further that:

> [T]he protection of Article 2, Paragraph 2, Sentence 1, of the Basic Law cannot be limited either to the 'completed' human being after birth or to the child about to be born which is independently capable of living. The right to life is guaranteed to everyone who 'lives', and *no distinction can be made here between various stages of life developing itself before birth, or*

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[172] *Id.* at 2197, n.4.

[173] *See* Jonas and Gorby, *supra* note 80, at 605 (translation of West German abortion decision).

[174] *Id.* at 638. In its opinion, the Federal Constitutional Court explained that the provision was included in the Basic Law "as a reaction to the 'destruction of life unworthy of life,' to the 'final solution' and 'liquidations,' which were carried out by the National Socialist Regime as measures of state." *Id.* at 637.

> *between unborn and born life. Everyone in the sense of [the provision] is everyone living; expressed in another way: every life possessing human individuality; 'everyone' also includes the yet unborn human being* (emphasis supplied).[175]

Viewed in the context of the fourteenth amendment's protection of "life", it is a narrow view of the right protected to distinguish the word "person" from "human beings" or "human life." *Roe* skirted and finessed this issue, saying the fetus was not a person "in the whole sense," albeit potential life deserving some protection. The Court's refusal to accord protection to classes or groups of persons is not new to its history. On more than one occasion in the past, courts and governments have through a "mask of legal concepts prevent[ed] humanity from being visible."[176]

Justice Stevens' acknowledgment that the state's interest is activated upon a showing of pain or pleasure is also new and provocative. If the state interest in the fetus increases dramatically upon the incidence of pain or pleasure, then the point at which the state's interest becomes compelling may advance before the end of the first trimester. As a medical matter, this could eventually eliminate abortion on demand except during

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[175] *Id.* at 638.

[176] *See* Noonan, *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668, 675 (1984). *See also* Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)(blacks are not citizens); United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879)(No. 14,891) (Indians are non-persons); *Cf.* Korematsu v. United States, 323 U.S. 283 (1944)(loss of citizenship and exclusion of Japanese citizens from West Coast war area).

Even one of the architects of abortion reform cited in *Roe v. Wade* has recognized that human life is involved in abortion:

> It is "human," since it was produced by human parents, and it is a "being," since it exists. And it is "autonomous", if nothing more is meant by that adjective than that it possesses a unique genetic organization. The question is whether, prior to birth, the offspring of human parents is a human *person.* Only *persons* are the subjects of legal rights, whether constitutional or other.

Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Rise From the Nineteenth Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty*, 17 N.Y. LAW FORUM 335 (1971). This distinction makes clear the positivistic nature of the abortion right, that is, ". . . there is no reality that the sovereign must recognize unless the sovereign, acting through the agency of the Court, decides to recognize it." Noonan, *supra* at 675. "To put it bluntly, law was the medium and lawyers were the agents responsibility for turning one class of human beings into property." *Id.* at 669.

very early pregnancy.[177] This is the "collision course" that Justice O'Connor previously identified as inherent in *Roe's* reliance on medical science. It remains to be seen whether this "collision" will take place through gradual erosion or by sudden termination.

2. *Fundamental Right.* The significance of the White-Stevens colloquoy on fetal life is in part related to whether abortion involves a fundamental right. Justice White argues that the liberty interest in abortion, unlike some of the Court's precedents involving childbearing, has no basis in liberty interests that are either "implicit in the concept of ordered liberty,"[178] or otherwise "deeply rooted in this Nation's history and tradition,"[179]. The utility of either of these formulations as a source of "fundamental" due process rights is, in Justice White's view:

> . . .to identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government—"the balance *struck by this country*," *id.*, at 542, 81 S.Ct. at 1776 (emphasis added)—and they seek to achieve this end through locating fundamental rights either in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both individual liberty and democratic order. Whether either of these approaches can, as Justice Harlan hoped, prevent "judges from roaming at large in the constitutional field," *Griswold*, 381 U.S. at 502, 85 S.Ct. at 1691, is debatable. What for me is not subject to debate, however, is that either of the basic definitions of fundamental liberties, taken seriously, indicates the illegiti-

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[177] *See* Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639, 697 (1986). This writer comments that:

> In defining the contours of the [abortion] right, however, [the Supreme Court] at least appeared to rely too heavily upon technological facts that were valid in 1973, but that were rapidly becoming obsolete. As the trimester system's medical foundation erodes, a similar fate for the abortion right itself is fearfully (or eagerly) being anticipated.

Rhoden, *supra*, at 697.

[178] *Thornburgh*, 106 S. Ct. at 2194 (quoting Palko v. Connecticut, 302 U.S. 319 (1937)).

[179] *Thornburgh*, 106 S. Ct. at 2194 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)(opinion of Powell, J.) and *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965)(Harlan, J., concurring)).

macy of the Court's decision in *Roe v. Wade*.[180]

Considering either formulation, and, at the same time, admitting the intellectual weaknesses of both, Justice White concludes that the values implicit in the Constitution do not compel recognition of abortion liberty as fundamental.

> The Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people, as does the continuing and deep division of the people themselves over the question of abortion. As for the notion that choice in the matter of abortion is implicit in the concept of ordered liberty, it seems apparent to me that a free, egalitarian, and democratic society does not presuppose any particular rule or set of rules with respect to abortion. And again, the fact that many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy strengthens my own conviction that the values animating the Constitution do not compel recognition of the abortion liberty as fundamental. In so denominating that liberty, the Court engages not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences. (footnotes omitted).[181]

Justice Stevens rejects the limits imposed by Justice White's two basic definitions for discerning the appropriate constitutional values at stake. Instead, he urges "a process of analysis and judgment that the guarantee of liberty requires"[182], drawing from Justice Harlan:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.
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> Each new claim to Constitutional protection must be con-

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[180] *Thornburgh*, 106 S. Ct. at 2194-95 (White, J., dissenting).
[181] *Id.* at 2196.
[182] *Id.* at 2189 n.10.

> sidered against a background of Constitutional purposes, as they have been rationally perceived and historically developed.[183]

These statements by Justices White and Stevens properly frame the real issue: which values shall control in constitutional adjudication. Justice Stevens prefers not to refer to "any code", but rather to a "background of Constitutional purposes, as they have been rationally perceived and historically developed." This analysis comports with the notion of the Constitution as an evolving, living document. This view of the Constitution sets few boundaries and is reminiscent of Chief Justice Charles Evans Hughes' pronouncement that the "Constitution is what the judges say it is."[184]

Justice White's approach, while expressly not interpretivist (i.e. in strict accord with the intent of the Framers), is somewhat ambivalant. It does not appear to require any particular fidelity to the Framer's intent, but accords great weight to values expressed in the Constitutional text. It also requires a more substantial showing in cases where the Court chooses to define fundamental rights that are not explicitly enumerated in the Constitution, by drawing upon the guidance provided by the "ordered liberty" and "history and tradition" standards. Finally, Justice White's approach recognizes limits on the ability of the judicial branch to resolve controversial issues which the Constitution does not explicitly or implicitly address, deferring on such issues to the democratically elected branches of government. In the end, the differences between Justices Stevens and White center on appropriate points of reference and the role of judiciary in deciding issues that are as political as they are legal.

3. *Compelling State Interest.* A second area of Constitutional inquiry in which the status of fetal life is relevant is the state's interest in protecting that life. If this state interest is

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[183] *Id.*

[184] D. Danelski and J. Tuchin, The Autobiographical Notes of Charles Evans Hughes 144 (1973). "As an Associate Justice, Hughes helped make the Constitution an instrument suitable for advancement of the progressive ideals he had championed as Governor." Note, *Governor on the Bench: Charles Evans Hughes as Associate Justice*, 89 Harv. L. Rev. 961, 996 (1976).

compelling, then individual liberty may be more severely circumscribed.

Justice White criticizes the Court's holding that the state's interest in protecting fetal life is "compelling" only *after* viability. Relying on Justice O'Connor's dissent in *Akron*, and Dean Ely's now shopworn, but nevertheless astute, criticism of the Court's choice of viability as a bright line ("It mistakes a definition for a syllogism")[185], Justice White urges a departure from the arbitrariness of viability to a new understanding of the governmental interest at stake:

> The governmental interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability. (footnotes omitted).[186]

Elaborating on her *Akron* dissent, Justice O'Connor reaffirms this view in greater detail in *Thornburgh*. She would recognize that the state's compelling interests identified in *Roe* exist "throughout pregnancy."[187] Judicial scrutiny of state regulations of abortion would be done under a rational basis test, i.e., whether the state regulation "bears a rational relationship to legitimate purposes such as the advancement of these compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an 'undue burden' on the abortion decision."[188]

An undue burden will generally be found "in situations involv-

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[185] Ely, *supra* note 6, at 924.
[186] *Thornburgh*, 106 S. Ct. at 2196-97 (White, J., dissenting).
[187] *Id.* at 2214.
[188] *Id.*

> ing absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree." *Id.* at 464, 103 S. Ct. at 2510 (O'Connor, J., dissenting). And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes "necessary to apply an exacting standard of review," *Id.* at 467, 103 S. Ct. at 2512 (O'Connor, J., dissenting), the possibility remains that the statute will withstand the stricter scrutiny. See *Id.*, at 473-74, 103 S. Ct. at 2515-16 (O'Connor, J., dissenting); *Ashcroft*, 462 U.S., at 505, 103 S. Ct. at 1532 (O'Connor, J., concurring in the judgment in part and dissenting in part).[189]

Justice O'Connor finds support for this analysis in the post-*Roe* abortion cases of *Harris v. McRae*,[190] *Maher v. Roe*,[191] *Beal v. Doe*,[192] and *Bellotti v. Baird*.[193] In her view, the Court has distorted and misapplied the analysis in *Akron* and *Ashcroft* and in *Thornburgh* as well. She criticizes the majority for adopting a new *per se* rule under which any regulation touching on abortion must be invalidated if it poses "an unacceptable danger of deterring the exercise of that right. (citation omitted).[194]

C. The Relevance of Bowers v. Hardwick

The linkage between the *Thornburgh* and *Bowers* cases is the right to privacy. The respondents in *Bowers* sought to decriminalize homosexual conduct by arguing that the right to privacy encompassed homosexual sodomy as part of a fundamental right to decide to beget or bear a child. In support of this position, the respondents cited the Court's substantive due process cases dealing with childrearing and education,[195] family relationships,[196] procreation,[197] marriage,[198] contraception[199] and

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[189] *Id.*

[190] 448 U.S. 297 (1980).

[191] 432 U.S. 464 (1977).

[192] 432 U.S. 438 (1972).

[193] 428 U.S. 132 (1976).

[194] *Thornburgh*, 106 S. Ct. at 2214 (O'Connor, J., dissenting)(citation omitted).

[195] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Neb., 262 U.S. 390 (1923).

[196] Prince v. Mass., 321 U.S. 158 (1944).

[197] Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535 (1942).

abortion,[200] most of which have been discussed in the previously described colloquy between Justices White and Stevens in *Thornburgh*. In *Bowers*, however, unlike *Thornburgh*, it was Justice White's position that prevailed. The majority opinion authored by White is remarkably similar to the fundamental interest analysis found in his *Thornburgh* dissent:

> Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far. (citation omitted)[201]

Posited against the two basic definitions used by the Court in identifying fundamental liberties, the Court rejects the respondent's argument as facetious, at best:

> It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen states when they ratified the Bill of Rights. In 1868, when the fourteenth amendment was ratified, all but 5 of the 37 states of the Union had criminal sodomy laws. In fact, until 1961, all 50 states outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy

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[198] Loving v. Va., 388 U.S. 1 (1967).

[199] Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[200] Roe v. Wade, 410 U.S. 113 (1973).

[201] *Bowers*, 106 S. Ct. at 2844-46.

> performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious. (citations and footnotes omitted).[202]

Institutional concerns, similar to those raised by Justice White in his dissent in *Thornburgh*, likewise prevailed in *Bowers*. The majority explicitly rejects "an expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause," opining that the Court is "most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[203]

Bowers, therefore, represents, at least, a philosophical withdrawal from a more expansive view of the Court's willingness to discern or declare "fundamental" rights under the Due Process Clause of the fourteenth amendment. Of course, time will tell whether *Bowers* is merely an anomaly or a decision with a more enduring meaning. Despite the broad justification of the decision, *Bowers* may only reveal the Court's reluctance to place its constitutional imprimatur on conduct that has long been generally considered anti-social, unnatural and immoral. Were the Court, in effect, to have imposed the homosexual lifestyle wholesale on the states, the legitimacy of the Court's exercise of its institutional power in the constitutional framework would very likely have been severely questioned or even challenged by the states or the other branches of government.

Whatever the background of the decision, the *Bowers* majority opinion is differentiated from Justice White's *Thornburgh* dissent by the vote of only one Justice — Justice Powell — who apparently disagrees with Justice White on abortion and agrees with him (except for possible eighth amendment problems in selected cases) on homosexuality. To the extent that Justice Powell's support of *Roe v. Wade* was grounded primarily in *stare decisis*, rather than on privacy grounds, the intellectual support for *Roe* is very shallow, indeed. His departure from the Court

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[202] *Id.* at 2844-46.

[203] *Id.* at 2846.

now puts the entire rationale of *Roe v. Wade* into question. The subjective nature of the different results reached in *Roe* and *Bowers*, does seem to underscore the point that in cases involving *controversial, newly discerned and asserted* Constitutional "rights" — with little or no roots in the history or tradition of our people — it is the democratically elected branch, and not the judiciary, that is best suited to resolve such issues.

CONCLUSION

It may be asked whether *Thornburgh* and *Bowers* constitute a watershed for substantive due process. The decisions reveal a marked split of opinion on the Court concerning the vitality of the privacy doctrine. There is no question that *Bowers* represents a setback for proponents of a broad right to privacy. This may be seen in its dashing of post-*Griswold* predictions that the Court would, "as mores change and knowledge of the problem grows", bring within its protection "all sexual activities of two consenting adults".[204] The Court has, however, exercised restraint on previous occasions in its response to new arguments that certain matters involved fundamental rights.[205] The importance of *Thornburgh* and *Bowers* thus may be not so much as a milestone or benchmark for the right to privacy, as for its demarcation of limits on the judicial prerogative and its renewal of the debate with respect to the values that should prevail in Constitutional adjudication with respect to abortion.

The Court's refusal in *Bowers* to extend the right to privacy to homosexual sodomy has resulted in the reassertion of limits (at least in the minds of five Justices) on the Court's authority to declare such rights. The boundaries of that authority — being (1) those fundamental liberties implicit in the concept of ordered liberty "such that neither liberty nor justice would exist if

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[204] Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 232 (1965).

[205] *See, e.g.* San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973)(declining to rule that education involved fundamental rights). The Court stated that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause." *Rodriguez*, 411 U.S. at 20.

[they] were sacrificed", *Palko v. Connecticut*,[206] and (2) those fundamental liberties that are "deeply rooted in this Nation's history and tradition," *Moore v. City of East Cleveland*[207] and *Griswold v. Connecticut*,[208] — are still broad and indefinite. The latter formulation at least has its roots in history and tradition, whereas the former might well have been construed to sustain the respondents in *Bowers*. Broader still is the approach in Justice Stevens' dissenting opinion, with its emphasis on "ordered liberty." Keying constitutional adjudication to the possible loss of "liberty" or "justice," is a very subjective standard indeed. In its application of the two formulations favored in *Bowers*, the majority draws primarily from history and tradition to support its conclusion that a right to engage in such conduct is not supported under either test.

Thornburgh reveals deeply entrenched views among members of the Court on the subject of abortion. The intensity of those views is more characteristic of a legislative body. Superficially, *Thornburgh* is not only a reaffirmation, but an expansion, of *Roe*. This is because *Roe* appeared to give states substantial leeway in regulating second and third trimester abortions. The *Thornburgh* majority, however, seems predisposed against almost *any* state abortion legislation (at least where a legislative motivation to restrict abortion is detected) and reveals scant willingness to permit abortion regulation short of nominal restrictions. This animus rarely appears in constitutional jurisprudence. Its only modern parallel is in the school desegregation cases.[209] For whatever reason, the *Thornburgh* majority appears determined, as Justice O'Connor writes, to design and impose an "undesired and uncomfortable straightjacket' . . . tailored for the 50 States."[210]

At the same time as the majority attempts to anchor *Roe* in constitutional jurisprudence, a significant and important judicial

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[206] 302 U.S. 319, 325-26 (1937).

[207] 431 U.S. 494, 503 (1977)(opinion delivered by Justice Powell.)

[208] 381 U.S. at 506.

[208] *See* Gilmore v. City of Montgomery, 417 U.S. 556 (1974); Norwood v. Harrison, 413 U.S. 455 (1973); Coit v. Green, 404 U.S. 997 (1971). *But see* Allen v. Wright, 104 S. Ct. 3315 (1984), *reversing* Wright v. Reagan, 656 F.2d 8200 (D.C. Cir. 1981).

[210] *Thornburgh*, 106 S. Ct. at 2216 (O'Connor, J., dissenting).

debate has commenced,[211] not only about the legitimacy of *Roe* and its effect on the Court as an institution, but also about the nature of the right granted in *Roe* and the state interest in protecting the fetus as a living entity. Justice White's views on these matters are now comprehensively and forcefully presented. His views may generate additional dissatisfaction in the legal community with *Roe v. Wade*.[212] Justice O'Connor's dissent further reflects her continuing dissatisfaction with the jurisprudence of *Roe*, at the same time revealing her caution about overruling that decision outright. And while the *Thornburgh* dissents raise fresh doubts about the validity of *Roe*, Justice Stevens plants and waters further the seeds of the so-called allocation of competences standard in privacy cases, raising new implications for medical treatment decisions that may affect handicapped infants, the seriously ill and the elderly, as well as the unborn.

In the final analysis, if "the roots of substantive due process decisions are not already in the nation, the decisions [of the Court] will lack 'power' or 'authority'."[213] And if the decisions lack power or authority, the ability of the Court to perform its constitutional function is itself undermined. In such circumstances, the doctrine of *stare decisis* may only perpetuate the error and breed the kinds of extremes found in *Thornburgh* where the Court, blinded by the impulse to defend itself and

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[211] The importance of this debate should not be underestimated. As Learned Hand once observed, "disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends." L. HAND, THE BILL OF RIGHTS 72 (1958).

[212] Even those who support the result reached in *Roe* appear resigned to its eventual demise. Despite early support for *Roe*, Professor Tribe now acknowledges that the "narrow boundaries of judicial capacity and competence" may make the judiciary "partly powerless to resolve" important issues like abortion. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 343 (1985). He continues: "[E]ven if *Roe v. Wade* were one day to be overruled, the rights it currently ensures would still have to be addressed by the lawmakers to whom the issue would be relegated." *Id.* n.49. Judge Ruth Bader Ginsburg has also recently admitted that " . . . *Roe* ventured too far in the change it ordered . . . . Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375, 381, 385 (1985).

[213] Perry, *Substantive Due Process Revisited: Reflections on (And Beyond) Recent Cases*, 71 NW. L. REV. 417 (1976).

impose its will in *Roe v. Wade* upon the states, breaches its obligation to the rule of law. "A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it."[214]

[214] Ely, *supra* note 6, at 949.

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COMMENTS

GENERAL, SPECIAL, LOCAL AND PRIVATE LEGISLATION: A MISSISSIPPI OVERVIEW

I. Introduction

The vast majority of state constitutions contain restrictions upon a legislature's power to pass special, local or private legislation.[1] Mississippi falls squarely in line with this majority.[2] Although the Mississippi judiciary began to interpret these restrictions as early as 1893,[3] today statutes continue to be challenged as local, private or special legislation passed in contravention of

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[1] 2 E. McQuillin, The Law of Municipal Corporations § 4.33, at 64 (R. Eickhoff & M. Meier 3d ed. rev. vol. 1979) [hereinafter cited as McQuillin]; *see* 2 Sutherland Statutory Construction § 40.01, at 135-37 (C. Sands 4th ed. 1973)(discussing state constitutional provisions) [hereinafter cited as Sutherland]. Connecticut, Delaware, Massachusetts and New Hampshire are in the minority of states that do not have general constitutional prohibitions against special legislation. Winters, *Classification of Municipalities*, 57 Nw. U.L. Rev. 279, 279-80 (1962). Vermont has also been cited as a minority state. Cloe & Marcus, *Special and Local Legislation*, 24 Ky. L.J. 351, 351 n.1 (1936). Even in the minority states some restrictions do exist. *See, e.g.*, Del. Const. art. II, § 19 (Supp. 1984)(prohibiting special laws regarding fences, livestock, ditches, school districts and roads); Vt. Const. ch. II, § 69 (repl. ed. 1985)(corporations to be organized by general laws).

[2] The Mississippi Constitution of 1890 contains provisions stating both a preference for general laws and a prohibition of special laws in certain enumerated cases. Miss. Const. art. IV, §§ 87, 88, 90. Mississippi's Constitution also provides a procedure for the legislature to follow in passing local and private legislation. Miss. Const. art. IV, § 89. As noted in Haas v. Hancock County, 183 Miss. 365, 184 So. 812 (1938), the court will not review legislative proceedings to see if the legislature complied with section 89 in the passage of a local law. *Id.* at 374-75, 184 So. at 813.

[3] Chidsey v. Scranton, 70 Miss. 449, 451-52, 12 So. 545, 545 (1893)(interpreting Miss. Const. art. IV, § 90(k)); *see infra* note 29.

the constitution.[4] One factor that may contribute to this recurring litigation is a lack of knowledge as to what criteria are to be applied in determining whether a statute is general or within the bounds of permissible local legislation. This comment will seek to expose the practitioner to the criteria that have been applied by the Mississippi Supreme Court, and where relevant, comparison will be made to criteria used by other jurisdictions as well.

II. Background and Constitutional Provisions

In the early years of our nation, laws were passed haphazardly, without regard as to whether they were general, special, local or private.[5] Little, if any, thought was given toward developing a systematic body of general law to meet the needs of people within a state,[6] nor was a framework enacted to control what would become an explosion of special legislation.[7]

By the mid-1800s, states began to adopt constitutional provisions to limit their legislatures' power to enact special legislation.[8] Several factors contributed to this movement. A principal factor was a desire for uniformity in the law.[9] Another factor was

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[4] For a recent case in which plaintiffs alleged a local and private act to be in violation of Miss. Const. art. IV, §§ 87, 90 see *In re* Validation of $7,800,000 Combined Utility System Revenue Bond, 465 So. 2d 1003, 1015-18 (Miss. 1985).

[5] Binney, *Restrictions Upon Local and Special Legislation in the United States* (part I), 32 Am. L. Reg. (n.s.) 613, 618 (1893)(*contained in* 41 U. Pa. L. Rev. 613, 618 (1893)). Often matters that had absolutely nothing in common were written into the same law. For example, an early Pennsylvania law that dealt with the rights of unmarried women also dealt with the expansion of the boundaries of a borough, as well as three other matters. *Id.* at 618 n.1.

[6] *Id.* at 618.

[7] *Id.* Cloe and Marcus have noted that where, in 1800, the products of legislators' efforts were contained in less than 100 pages, within 50 years " their enactments were often to be measured by volumes rather than pages." Cloe & Marcus, *supra* note 1, at 355-56; *cf.* Mallison, *General Versus Special Statutes in Ohio*, 11 Ohio St. L.J. 462, 462 (1950)(early Ohio legislature passed special laws in disproportionate number and without consideration of their merits). Mississippi was no exception. In 1888, the laws of the State and their index filled 705 pages. 1888 Miss. Laws. In 1890, the laws filled 808 pages. 1890 Miss. Laws. Following the enactment of the Constitution of 1890, the number of laws passed were drastically reduced. For example, the laws of 1894 were contained in only 163 pages, 1894 Miss. Laws, and the laws of 1896 filled only 254 pages. 1896 Miss. Laws.

[8] Cloe & Marcus, *supra* note 1, at 355. New Jersey, North Carolina and Indiana were among the first states to adopt such restrictions. *Id.* at 355 n.19.

[9] O. Reynolds, Handbook of Local Government Law § 33, at 86 (1982); see Suth-

the prevention of "logrolling," a practice whereby members of the legislature voted for other members' local bills in return for the same consideration.[10] A third factor was that it was not unusual for several local bills to be enacted where one general bill would suffice, and consequently the legislature's time was being wasted on the details of individual fact situations.[11] A 1890 Mississippi law[12] provides a classic example. The law defined what would constitute a lawful fence and made it unlawful for hogs, sheep or goats to "run at large," but only in "that portion of Clay County south of Tibbee creek."[13] Still another factor leading to reform was a desire to avoid favoritism inherent in much of the private legislation being passed in that day.[14]

Although the specific constitutional provisions vary from state to state, the restrictions they contain usually take on one or more common forms. A number of states prohibit the enactment of special laws where a general law already exists on the subject.[15] Many expand that restriction to include cases where a

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ERLAND, *supra* note 1, § 40.01, at 135 (constitutional prohibitions enacted "to achieve greater universality and uniformity" in law).

[10] *See* Nutting, *Special Legislation in Nebraska*, 17 NEB. L. BULL. 332, 333 (1938)(prevalence of special legislation led to excessive logrolling); *see also* O. REYNOLDS, *supra* note 9, at 86 (if special laws allowed, logrolling results).

As a part of the oath of their office, Mississippi legislators are required to swear or affirm the following: "I will not vote for any measure or person because of a promise of any other member of this legislature to vote for any measure or person, or as a means of influencing him or them so to do." MISS. CONST. art. IV, § 40.

[11] *See* Nutting, *supra* note 10, at 333 (special legislation made it impossible for legislature "to give sufficient attention to matters of general concern"); *cf.* 1 C. SANDS & M. LIBONATI, LOCAL GOVERNMENT LAW § 3.21, at 3-76 (1981)(constitutional provisions enable legislature to focus energies on affairs of state at large).

[12] Act of Feb. 21, 1890, ch. 149, 1890 Miss. Laws 234.

[13] *Id.* at 234. Presumably, these same animals were allowed to run amuck if they could get across the creek.

[14] SUTHERLAND, *supra* note 1, § 40.01, at 135. *See generally*, 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 141, at 244-56 (5th ed. 1911)(discussing policy and purpose behind constitutional prohibitions). For a judicial commentary on the "inherent vice" of special legislation and the unfavorable results it produces, see Anderson v. Board of Comm'rs of Cloud County, 77 Kan. 721, 95 P. 583, 586 (1908).

[15] SUTHERLAND, *supra* note 1, § 40.01, at 135. This is a relatively weak provision, as it does not prohibit a local law where a general law could be written, but only where a general law has already been written. 1 C. SANDS & M. LIBONATI, *supra* note 11, § 3.24, at 3-84. This type of provision is found in MD. CONST. art. III, § 33.

general law can be made applicable.[16] Another popular clause bars local bills in certain specifically enumerated cases.[17] Approximately eighty different types of legislation may be barred;[18] for example, local bills granting divorces,[19] changing the name of an individual[20] and exempting any person from jury duty[21] are barred in many states. A few states have procedural safeguards, such as requiring publication of notice before introducing a local bill.[22] Special legislation has also been banned in cases where courts can give relief.[23]

The Mississippi Constitution of 1890 deals with special legislation in sections 87-90.[24] The constitution prohibits the enactment of special or local laws in cases which are or can be provided for by general law and in cases where a general law can be made applicable.[25] Special laws are also banned where the relief

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[16] McQUILLIN, supra note 1, § 4.39, at 73-74. Examples are found in ALASKA CONST. art. II, § 19; MISS. CONST. art. IV, § 87; OKLA. CONST. art. V, § 59; S.C. CONST. art. III, § 34 (IX). Two interpretations of this type provision have been suggested: 1) It restricts local laws only where there is an existing general law that may be applied by the courts, or 2) more broadly, it restricts local laws whenever the subject matter could be treated in a general act, even if such an act does not exist. 1 C. SANDS & M. LIBONATI, *supra* note 11, § 3.24, at 3-84; *cf.* O. REYNOLDS, *supra* note 9, § 33, at 87 (provision effects near total prohibition of special laws).

Some states require that all laws of a general nature shall have a uniform operation throughout the state. McQUILLIN, *supra* note 1, § 4.39, at 74. Oklahoma is an example. OKLA. CONST. art. V, § 59. This has been held to have the same effect as a prohibition of special laws when a general law may be made applicable. McQUILLIN, *supra* note 1, § 4.39, at 74 (citing Rainey v. Michel, 6 Cal. 2d 259, 57 P.2d 932 (1936)).

[17] E. STASON & P. KAUPER, CASES AND MATERIALS ON THE LAW OF MUNICIPAL CORPORATIONS 28-30 (3d ed. 1959). Examples include ALA. CONST. art. IV, § 104; ARK. CONST. art. V, § 24; MISS. CONST. art. IV, § 90; TENN. CONST. art. VI, §§ 4, 6.

[18] SUTHERLAND, *supra* note 1, § 40.01, at 135.

[19] *See* F. HORACK, CASES AND MATERIALS ON LEGISLATION 470 (2d ed. 1954)(constitutions generally prohibit granting divorce by private bill).

[20] ALA. CONST. art. IV, § 104(3).

[21] MISS. CONST. art. IV, § 90(k).

[22] O. REYNOLDS, *supra* note 9, at 87; SUTHERLAND, *supra* note 1, § 40.01, at 137. Florida is an example. FLA. CONST. art. 3, § 10. *See generally* Annot., 106 A.L.R. 1471 (1937)(construing prerequisites for passage of local laws).

[23] SUTHERLAND, *supra* note 1, § 40.01, at 137. MISS. CONST. art. IV, § 87 is a typical provision.

[24] MISS. CONST. art. IV, §§ 87-90.

[25] MISS. CONST. art. IV, § 87. Section 87 provides:

> No special or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by general law, or where the relief sought can be given by any court of this state; nor shall the operation of

sought can be given by the courts.[26] Neither are general laws to be suspended for the benefit of any individual, private corporation or association.[27] Instead, the legislature is instructed to pass general laws, "under which local and private interests shall be provided for and protected . . . ."[28] Furthermore, twenty-one specific instances are enumerated in which local, private, or special laws are not to be passed.[29] However, if an area has not been

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any general law be suspended by the legislature for the benefit of any individual or private corporation or association, and in all cases where a general law can be made applicable, and would be advantageous, no special law shall be enacted.

Id.

[26] *Id.*

[27] *Id. But cf.* City of Jackson v. Deposit Guaranty Bank & Trust Co., 160 Miss. 752, 765, 133 So. 195, 197 (1931)(allowing a general law to be suspended by another general law).

The court has consistently held that section 87 does not apply to public bodies. *See In re* Validation of $7,800,000 Combined Utility System Revenue Bond, 465 So. 2d 1003, 1015-16 (Miss. 1985)("the prohibitions of Section 87 are wholly inapplicable to 'public' entities such as the Gautier Utility District"); Feemster v. City of Tupelo, 121 Miss. 733, 743, 83 So. 804, 806 (1920)(section 87 prevents "local and special laws for such corporations as were *not* public in their nature")(emphasis added), *quoted in In re* Validation of $15,000,000 Hospital Revenue Bonds, 361 So. 2d 44, 48-49 (Miss. 1978); *see also* Palmertree v. Garrard, 207 Miss. 796, 803-04, 43 So. 2d 381, 381-82 (1949)(section 87 inapplicable in suit against Water and Electric Commission of Greenwood); City of Greenwood v. Telfair, 207 Miss. 200, 206-07, 42 So. 2d 120, 122 (1949)(section 87 had no application to local and private law applying to municipal corporation).

[28] MISS. CONST. art. IV, § 88.

[29] MISS. CONST. art. IV, § 90. Section 90 provides:

The legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.:

(a) Granting divorces;
(b) Changing the names of persons, places, or corporations;
(c) Providing for changes of venue in civil and criminal cases;
(d) Regulating the rate of interest on money;
(e) Concerning the settlement or administration of any estate, or the sale or mortgage of any property, of any infant, or of a person of unsound mind, or of any deceased person;
(f) The removal of the disability of infancy;
(g) Granting to any person, corporation, or association the right to have any ferry, bridge, road, or fishtrap;
(h) Exemption of property from taxation or from levy or sale;
(i) Providing for the adoption or legitimation of children;
(j) Changing the law of descent and distribution;
(k) Exempting any person from jury, road, or other civil duty (and no person shall be exempted therefrom by force of any local or private law);

specifically excluded, a procedure is given whereby the legislature may pass local or private legislation.[30]

III. DEFINITIONS

Laws have been referred to at various times as being either general, local, private, public or special.[31] Attempts to explain the differences between these types of laws have yielded definitions that are less than lucid.[32] Only acts deemed to be public were given cognizance at common law, and these were denoted

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(l) Laying out, opening, altering, and working roads and highways;
(m) Vacating any road or highway, town plat, street, alley, or public grounds;
(n) Selecting, drawing, summoning, or empaneling grand or petit juries;
(o) Creating, increasing, or decreasing the fees, salary, or emoluments of any public officer;
(p) Providing for the management or support of any private or common school, incorporating the same, or granting such school any privileges;
(q) Relating to stock laws, water-courses, and fences;
(r) Conferring the power to exercise the right of eminent domain, or granting to any person, corporation, or association the right to lay down railroad tracks or street-car tracks in any other manner than that prescribed by general law;
(s) Regulating the practice in courts of justice;
(t) Providing for the creation of districts for the election of justices of the peace and constables; and
(u) Granting any lands under control of the state to any person or corporation.

Id.

[30] MISS. CONST. art. IV, § 89. If this procedure is followed, the courts will not overturn legislation as being special. *Id.* Indeed, the Mississippi Supreme Court has said that it will not examine legislative proceedings to check for compliance with section 89. Haas v. Hancock County, 183 Miss. 365, 374-75, 184 So. 812, 813 (1938); *see In re* Validation of $15,000,000 Hospital Revenue Bonds, 361 So. 2d 44, 48 (Miss. 1978)(unless act suspended general law, it was matter for legislature; court would enforce "legislative mandate" of section 89). The court has noted that section 89 prohibits the judiciary from annulling an act passed in accord with that section. Yazoo & M.V.R. Co. v. Southern Ry., 83 Miss. 746, 773, 36 So. 74, 79 (1904). However, section 89 does not modify the restrictions in section 87 or section 90. *Id.; accord In re* Validation of $7,800,000 Combined Utility System Revenue Bond, 465 So. 2d 1003, 1016 (Miss. 1985)(when act complies with section 89, court will not " ' refuse to enforce it' unless it contravenes section 90").

[31] *See generally* MCQUILLIN, *supra* note 1, §§ 4.44-4.48, at 78-85 (discussing distinctions between definitions of general, local, private, public and special laws).

[32] Comment, *Local Legislation in Alabama: The Impact of* Peddycoart v. City of Birmingham, 32 ALA. L. REV. 167, 168 (1980); *see also* Binney, *supra* note 5, at 721 (the phrase "general law" has not been easy to define); Winters, *supra* note 1, at 281 (use of words "special," "local" and "private" cause much confusion).

general laws.[33] This was a mistake, because not every public law was a general law.[34]

Laws are said to be general when they operate uniformly on a particular class.[35] In *State ex rel. Knox v. Speakes*,[36] the Mississippi Supreme Court stated, "[a] law is general in the sense of such a constitutional provision[37] when it applies to and operates uniformly on all members of any class of persons, places, or things requiring legislation peculiar to the particular class dealt with by the law."[38] A law does not have to apply to all persons in the state to be general.[39] Indeed, a law may be general although it operates on a class with only one member.[40]

By contrast, a special law operates on less than all members of a class.[41] It arbitrarily limits what would otherwise be a larger group,[42] and this type of law is often made for an individual case.[43] An oft-cited test provides that "[a] statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is spe-

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[33] SUTHERLAND, *supra* note 1, § 40.02, at 139.

[34] MCQUILLIN, *supra* note 1, § 4.45, at 81; *cf.* SUTHERLAND, *supra* note 1, § 40.02, at 140 (general laws referred to by state constitutions are more limited forms of public acts than were those at common law).

[35] Comment, *A History of the Constitutionality of Local Laws in Texas*, 13 BAYLOR L. REV 37, 43 (1961).

[36] 144 Miss. 125, 109 So. 129 (1926).

[37] The provision referred to is MISS. CONST. art. IV, § 87. City of Jackson v. Deposit Guar. Bank & Trust Co., 160 Miss. 752, 766, 133 So. 195, 197 (1931).

[38] *Speakes*, 144 Miss. at 155-56, 109 So. at 132, *quoted in* State *ex rel.* Jordan v. Gilmer Grocery Co., 156 Miss. 99, 121-22, 125 So. 710, 717 (1930) and Riverside Drainage Dist. V. Buckner, 108 Miss. 427, 441, 66 So. 784, 786 (1914). If a law affects all municipal corporations in a state, then that law is general. 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 2.14, at 2-39 (1986).

[39] *Speakes*, 144 Miss. at 156, 109 So. at 132; *see* Toombs v. Sharkey, 140 Miss. 676, 692, 106 So. 273, 275 (1925)(law is general not because it operates on all people, but because it operates on all brought within its scope); *see also* MCQUILLIN, *supra* note 1, § 4.44, at 78 (law is general, though it applies to less than all in state).

[40] Vardaman v. McBee, 198 Miss. 251, 260, 21 So. 2d 661, 664 (1945)(citing Toombs v. Sharkey, 140 Miss. 676, 693, 106 So. 273, 275 (1925)). A statute applying to a single county may still be general. Loden v. Mississippi Pub. Serv. Comm'n, 279 So. 2d 636, 639 (Miss. 1973).

[41] MCQUILLIN, *supra* note 1, § 4.47, at 83.

[42] Winters, *supra* note 1, at 279. A law is special if it does not apply to all localities that are similarly situated. 1 C. SANDS & M. LIBONATI, *supra* note 11, § 3.21, at 3-74.

[43] MCQUILLIN, *supra* note 1, § 4.47, at 83. *See*, Miller v. Pasco, 50 Wash. 2d 229, 310 P.2d 863, 866 (1957)(discussing statute expressly applicable to single city).

cial."[44] Even so, it has been said that no definite rule can be used to determine if a law is special and that the decision must be made on a case-by-case basis.[45]

To further confuse matters, the distinction between a local law and a special law is somewhat shaded. The terms are often used interchangeably, and they have been said to be synonymous.[46] Occasionally, courts have differentiated between the two by stating that a local law relates to a geographic unit, while a special law relates to persons.[47] But Mississippi courts have referred to "class legislation," as equating it to "local or private legislation," and noted that it refers to certain persons, classes of persons, or districts within the state.[48] In other jurisdictions, a local law may be public or private.[49]

IV. CLASSIFICATION

Constitutional preclusions upon the passage of special legislation do not forbid the use of classification as a legislative means.[50] Classification contemplates that public bodies or communities will be grouped together for the purposes of legislation because of similarity of situation, substance, requirements or convenience, and that their public interests will be best served by similar regulations.[51] Classification has also been described as

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[44] Bloxham v. F.C. & P. Ry., 35 Fla. 625, 17 So. 902, 924 (1895), *quoted in* State *ex rel.* Davis v. Love, 9 Fla. 333, 126 So. 374, 380 (1930); *see* Comment, *supra* note 35, at 42 (reciting same test in Texas).

[45] 1 C. SANDS & M. LIBONATI, *supra* note 11, § 3.25, at 3-86.

[46] MCQUILLIN, *supra* note 1, § 4.48, at 83; *see* Anderson, *Special and Local Acts in Arkansas*, 3 ARK. L. REV. 113, 113 (1949)(noting synonymous use of terms).

[47] *E.g.*, Phillips v. Giddings, 278 Ark. 368, 646 S.W.2d 1, 2 (1983)(local law refers to political or geographical units); *see also* 1 C. SANDS & M. LIBONATI, *supra* note 11, § 3.25, at 3-87 (local law is type of special law that distinguishes subject matter on geographic basis). *See generally* Note, *Municipal Corporations - Constitutionality of Local or Special Laws*, 10 TEX. L. REV. 108, 108 (1931)(local law applies to only part of "legislative jurisdiction").

[48] Vardaman v. McBee, 198 Miss. 251, 260, 21 So. 2d 661, 664 (1946). *See* Lovorn v. Hathorn, 365 So. 2d 947, 949 (Miss. 1979)(quoting *Vardaman*).

[49] MCQUILLIN, *supra* note 1, § 4.48, at 85. *See* Wieder v. Hoss, 143 Or. 57, 21 P.2d 227, 229 (1933)(classifying statute exempting state agency's land from taxation as public land).

[50] J. FORDHAM, LOCAL GOVERNMENT LAW: LEGAL AND RELATED MATERIALS 66 (rev. ed. 1975).

[51] 1 J. DILLON, *supra* note 14, § 147, at 267.

"the designation of common characteristics to limit the applicability of legislation to those within the resulting class."[52] It has been said that the use of the device of classification has been the crux of the problem in applying the constitutional prohibitions against special legislation.[53] One reason is that legislative measures have often been couched in terms of general legislation, but include a classification scheme that renders it special in application.[54] For example, in *Smith v. Transcontinental Gas Pipeline Corporation*,[55] an act provided for the underground storage of natural gas in depleted strata.[56] The act contained a section that excluded from its operation "a county having two judicial districts and being intersected by U.S. Highway 84 and Interstate 59," which referred only to Jones County.[57] The trial court found the section to be a private and local exception to the otherwise general act and therefore unconstitutional.[58] The Mississippi Supreme Court affirmed the ruling, noting that the constitution bars "county wide" laws (those applying to one or more counties only) having no rational classification.[59]

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[52] Winters, *supra* note 1, at 284.

[53] *Id.*

[54] J. FORDHAM, *supra* note 50, at 66.

[55] 310 So. 2d 281 (Miss. 1975).

[56] Act of Mar. 24, 1971, ch. 436, 1971 Miss. Gen. Laws 472 (codified at MISS. CODE ANN. §§ 53-3-151 to -165 (1972)).

[57] *Smith*, 310 So. 2d at 281-82.

[58] *Id.* at 282.

[59] *Id.* at 285. The court found that the criteria used in the section in question bore no identifiable or rational relationship to the general purpose of the act, and that there was no reasonable basis for the exclusion of Jones County. *Id.*

In reaching its decision, the court approved a list of four elements required to make a general law operate uniformly, which were first enumerated by the Ohio Court in State *ex rel.* English v. Indus. Comm'n, 160 Ohio St. 443, 448-49, 117 N.E.2d 22, 25 (1954), *cited with approval in* State *ex rel.* Newell v. Brown, 162 Ohio St. 147, 122 N.E.2d 105, 110 (1954). The elements are:

1. The law must operate equally upon the members of the class to be affected.
2. It must embrace all persons who are or may be in like situations and circumstances.
3. The designation of the class must be reasonable and not unjust or capricious.
4. The designation must be based upon a real distinction.

Smith, 310 So. 2d at 284.

A. Valid Classifications

Numerous criteria have been put forth to test the validity of a particular classification.[60] The courts, however, have not always applied a consistent set of criteria to differing fact situations. The rule that a classification must be reasonable has appeared frequently.[61] Another familiar rule is that the classification must be germane to the purpose of the legislation.[62] Unfortunately what is reasonable and what is germane has tended to vary with each case.[63] An examination of some of the relevant Mississippi cases should be illuminating.

The early case of *Toombs v. Sharkey*[64] concerned pay increases for county prosecuting attorneys. An act was passed which used a classification scheme based on assessed valuation of land in each county; as the assessed value increased, the salary range of the attorney increased.[65] The highest salary range was based on three factors. In addition to having $25,000,000 or more assessed value, a county had to be in a levee district and pay a cotton tax for levee purposes.[66] These factors were met only in Washington and Bolivar Counties.[67] The court discussed several criteria to be used in analyzing the constitutionality of the act. First, the substance, rather than the form, of an act is to be examined to aid in determining whether the classification is reasonable.[68] Second, the classification must be germane to the subject matter of the act.[69] Third, the act must apply to all

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[60] *See* McQUILLIN, *supra* note 1, § 4.55, at 95-97 (listing nine different criteria); O. REYNOLDS, *supra* note 9, § 33, at 90 (listing five criteria classification must meet to avoid being special legislation).

[61] *E.g.*, Webb v. Adams, 180 Ark. 713, 23 S.W.2d 617, 621 (1929); Southeastern Constr. Co. v. Dodson's Dependent, 247 Miss. 1, 18, 153 So. 2d 276, 284 (1963), Lebanon v. Schneider, 340 Mo. 712, 163 S.W.2d 588, 590 (1942).

[62] *E.g.*, Smith v. Transcontinental Gas Pipeline Corp., 310 So. 2d 281, 285 (Miss. 1975); Delta & Pine Land Co. v. Board of Supervisors, 228 So. 2d 893, 895-96 (Miss. 1969); Toombs v. Sharkey, 140 Miss. 676, 691, 106 So. 273, 274 (1925).

[63] *See generally* Horack, *Special Legislation: Another Twilight Zone*, 12 IND. L.J. 109, 125 (1936)("standards of reasonableness have been tenuous").

[64] 140 Miss. 676, 106 So. 273 (1925).

[65] *Toombs*, 140 Miss. at 688-89, 106 So. at 273-74.

[66] *Id.* at 690, 106 So. at 274.

[67] *Id.* at 691, 106 So. at 274.

[68] *Id.* at 690, 106 So. at 274.

[69] *Id.* at 691, 106 So. at 274. The court noted that other counties which had greater

members within the same class.[70] Fourth, the classification must be reasonably related to the purpose of the act.[71] Fifth, there should be substantial distinctions that make the classes different from one another.[72] In applying these criteria the court found that the act in question was not general and thus violated section 90(o) of the Mississippi Constitution.[73]

In *Board of Education v. State Educational Finance Commission*,[74] the court noted several other guidelines for determining the validity of a classification. The case involved an act relating to school districts and pupil assignments.[75] The act provided generally that children were to attend schools in their own county, but the act created an exception that allowed some children to attend a school in an adjacent county.[76] The Benton County Board of Education argued that the act violated section

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populations were likely to have more crimes committed in them, yet they were to pay their prosecutors less. *Id. See generally* Hubbard, *Special Legislation for Municipalities*, 18 HARV. L. REV. 588, 595-97 (1905)(discussing germane doctrine).

[70] *Toombs*, 140 Miss. at 693, 106 So. at 275. The court noted that Coahoma County and Issaquena County had similar environment and characteristics to those in the top classification but were excluded from it. *Id.*

[71] *Id.* at 693-97, 106 So. at 275-76. The court found no reasonable relation between the payment of a cotton tax and the payment of a prosecutor. *Id.* at 695, 106 So. 2d at 276.

In State *ex rel.* Jordan v. Gilmer Grocery Co., 156 Miss. 9, 125 So. 710 (1930), a price-control statute divided owners of cotton gins into two classes: those who operated one gin, and those who operated two or more. *Id.* at 116-17, 125 So. at 715. The classification was challenged as being unreasonable and arbitrary but the court observed that the purpose of the statute was to prevent unfair competition. *Id.* at 118, 125 So. at 716. The court found that the classification was reasonable and not arbitrary, as it pointed to a separate and distinct class, and that consequently, the statute did not violate section 87 of the constitution. *Id.* at 121, 125 So. at 717.

[72] *Toombs*, 140 Miss. at 695, 106 So. at 276. The court found no substantial difference between a person who lives within a levee district and a person who lives without a levee district. *Id.*

[73] *Id.* MISS. CONST. art. IV, § 90(o) prohibits, *inter alia*, increasing the salary of any public officer by local, private or special legislation.

[74] 243 Miss. 782, 138 So. 2d 912 (1962).

[75] *Board of Educ.*, 243 Miss. at 803-04, 138 So. 2d at 920-21.

[76] *Id.* The exception provided that where there were two counties, each organized on a county-unit basis, and students living in one county had been attending school in the adjoining county and this practice was more than forty years old, and the county line was within 1,000 yards of the school property, then transfers could be granted. *Id.* at 804, 138 So. 2d at 921.

90(p) of the Mississippi Constitution.[77] After finding that the exception was germane to the purpose of the act,[78] the court noted that a statute has a strong presumption of validity and that the one challenging it carries the burden of proof.[79] The court held that whether or not a classification is reasonable is primarily a question for the legislature,[80] and that if any basis can be conceived to sustain it, then the classification will be upheld.[81]

B. Various Classification Schemes

1. Population

Population has been deemed to be a valid basis for classification.[82] The requirements of reasonableness and uniform application to the class are applicable,[83] and courts will often look to see if the population is germane to the purpose of the act.[84] Courts have recognized that the need for complexity and size of government increases with the number of people to be governed.[85]

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[77] *Id.* at 809-10, 138 So. 2d at 924. Section 90(p) states that no local, private or special law shall be passed which provides for the management or support of any private or common school. MISS. CONST. art. IV, § 90(p).

[78] *Board of Educ.*, 243 Miss. at 812, 138 So. 2d at 925.

[79] *Id.* at 812-13, 138 So. 2d at 925-26 (citing State *ex rel.* Jordan v. Gilmer Grocery Co., 156 Miss. 99, 113, 125 So. 710, 714 (1930)).

[80] *Id.* at 814, 138 So. 2d at 926. The court noted that even if the statute seemed unreasonable to the court, it would be sustained if the legislature could have thought it was reasonable. *Id.*

[81] *Id.*

[82] O. REYNOLDS, *supra* note 9, § 33, at 89; *see, e.g.*, State v. City of Miami Beach, 234 So. 2d 103, 106 (Fla. 1970)(tourism tax statute based on population classification was valid); Yoo Kun Who v. Kelly, 154 So. 2d 161, 165 (Fla. 1963)(legislation could, within reasonable limits, classify counties for governmental purposes based on population).

[83] *Sutherland, supra*, note 1 § 4.70 at 115. *See, e.g.* Hamilton v. Autouga County, 289 Ala. 419, 268 So. 2d 30, 35 (1972)(act establishing sheriffs' salaries based on population was reasonable); Carter v. Norman, 38 So. 2d 30, 32 (Fla. 1948)(classification of counties for governmental purposes was permissible if classification was reasonable).

[84] McQUILLAN, *supra* note 1, § 4.70, at 115. *See, e.g.*, Inter-City Fire Protection Dist. v. Gambrell, 360 Mo. 924, 231 S.W.2d 193, 198 (1950)(population classification for fire protection was germane to purpose of providing better fire department service).

[85] 1C. SANDS & M. LIBONATI, *supra* note 11, § 3.28, at 3-101; *see, e.g.* State v. Thompson, 193 Ala. 561, 69 So. 461, 462-63 (1915)(Court rejected challenge to legislature's amending charter powers of municipal corporation); People v. Henshaw, 76 Cal.

In *Clark v. State*,[86] the court rejected a challenge to the constitutionality of an act regulating the practice of barbering.[87] The act set up various qualifications for a person to meet in order to become a barber.[88] The act also exempted certain people, among whom were those practicing in a town of less than 500 people and those practicing outside a city having a population of 500 or greater.[89] The act was challenged as being violative of section 87 of the Mississippi Constitution.[90] The court, noting the legislature's wide discretion, stated that if the classification was reasonable and embraced all of the class, then the law was general, and the classification had a reasonable relation to the purpose sought to be obtained.[91] The court reasoned that the test was whether the classification was reasonably expected to obtain the object to be accomplished and was germane thereto.[92] In this case, the statute was general because it applied to all barbers in cities with a population of 500 or greater.[93]

Jackson Redevelopment Authority v. King, Inc.[94] presented the problem of classification by population for the purpose of constructing municipal parking facilities.[95] In 1977, Miss. Code Ann. § 43-35-201 gave authority to certain municipalities to construct parking facilities.[96] Due to the nature of the population

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436, 18 P. 413, 418 (1888)(Court upheld act abolishing office of police judge at expiration of term). *See generally*, Horack & Welch, *Special Legislation: Another Twilight Zone*, 12 IND. L.J. 183, 183-92 (1937)(discussing population as guideline for grouping).

[86] 169 Miss. 369, 152 So. 820 (1934).

[87] *Clark*, 169 Miss. at 384-85, 152 So. at 824.

[88] *Id.* at 378, 152 So. at 821. This act required that every barber must have a certificate of registration to practice barbering. The qualifications necessary to obtain this certificate included: (1) that the person be at least 18 years old and free of any contagious or communicable disease; (2) that the person must have been an apprentice with a registered barber for 12 months; and (3) that he must have passed an examination to determine his fitness for barbering. *Id.*

[89] *Id.* at 379, 152 So. at 821. The act also exempted physicians, surgeons, nurses and beauty parlor operators. *Id.*

[90] *Id.* at 382, 152 So. at 823. *See supra* notes 24-26.

[91] *Id.* at 383, 152 So. at 823.

[92] *Id.*

[93] *Id.* The fact that some barbers practicing in "isolated communities" were excluded was not enough to make the classification unjust. *Id.*

[94] 364 So. 2d 1104 (Miss. 1978).

[95] *Jackson Redevelopment Auth.*, 364 So. 2d at 1106-07.

[96] MISS. CODE ANN. § 43-35-201 (Supp. 1977)(amended 1984).

classification, only four cities were granted authority: Jackson, Vicksburg, Corinth and Gulfport.[97] Since only Jackson's authority was being questioned, the court considered only the first category in the classification scheme, which granted authority to any municipality of 100,000 population or more.[98] The court noted that a law may be general even though its classification operates on only one person or place[99] and that population classification is permissible where it is germane to the subject matter and reasonably related to the purpose of the law.[100] The classification at bar was held to be clearly general, as 1) it was based solely on population, 2) it was not tied to any particular census,[101] and 3) any municipality could come within the scheme when its population reached 100,000.[102] Thus, the classification

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[97] *Jackson Redevelopment Auth.*, 364 So. 2d at 1113 (Bowling, J., specially concurring). The statute provided four levels of classification: 1) municipalities of 100,000 or more, 2) municipalities of 25,000 or more located in a county adjacent to a county containing a municipality of 100,000 or more, 3) municipalities in any county containing a population of 130,000 or more as fixed by the 1970 census, and 4) municipalities in any county containing a population of 27,000 or more as fixed by the 1970 census and "bordering on the State of Tennessee wherein United States Highways 61 and 84 intersect." MISS. CODE ANN. § 43-35-201 (Supp. 1977)(amended 1984). The statute was amended in 1984 to include any municipality containing a population of 38,000 or more as fixed by the 1980 census and "bordering on the Mississippi River wherein United States Highways 61 and 84 intersect." MISS. CODE ANN. § 43-35-201 (Supp. 1985).

[98] *Jackson Redevelopment Auth.*, 364 So. 2d at 1108. The court reasoned that it did not have to analyze the other categories because even if they were improper, the court had a duty to separate the valid from the invalid categories, and the valid would stand. *Id.* (citing Wilson v. Jones County Bd. of Supervisors, 342 So. 2d 1293, 1296 (Miss. 1977)).

[99] *Id.* at 1107.

[100] *Id.* at 1108.

[101] *Id.* Local government entities are normally assigned to their respective class in a population scheme according to the most recent federal census. 1 C. SANDS & M. LIBONATI, *supra* note 11, § 3.28, at 3-103. *See generally* Hester v. Copiah County, 186 Miss. 716, 719, 191 So. 496, 496 (1939)(current federal census is exclusive evidence of population unless expressed otherwise in enactment)(citing Brown v. Reeves, 129 Miss. 755, 766-68, 92 So. 825, 828 (1922)). Note, however, that if classification is fixed according to a particular census, then it creates a closed class, and the law may be held to be special. O. REYNOLDS, *supra* note 9, § 33, at 90; *see* Wilson v. Jones County Bd. of Supervisors, 342 So. 2d 1293, 1296 (Miss. 1977)(designation of Jones County by referring to 1960 census did not bear rational relationship to purpose of statute).

[102] *Jackson Redevelopment Auth.*, 364 So. 2d at 1108. Classification schemes that are worded so that another municipality, through growth or otherwise, may eventually become a part of the class are known as open-end classifications. *See* Winters, *supra* note 1, at 287-91 (discussing open-end classification).

was valid, reasonable and germane, and the statute was constitutional as a general law.[103]

2. *Geographical Factors*

There is a split over the propriety of using geographical factors in classifications. Some jurisdictions hold that grouping on the basis of permanent conditions, like geographic location, does not produce special legislation.[104] The idea is that no change in the classification is ever needed because the geographic conditions underlying the scheme will not change.[105] Others find that because the classification does not change, the net result is a prohibited closed class.[106] A better test would seem to be whether the geographical factor is reasonably related to the purpose and subject matter of the statute.[107] Several Mississippi cases are significant.

Culley v. Pearl River Industrial Commission[108] revolved around the creation of the Pearl River Valley Water Supply District.[109] Section 5(a) of the enabling legislation provided that "any county through which the Pearl River runs or which bor-

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[103] *Jackson Redevelopment Auth.*, 364 So. 2d at 1106.

[104] *See* Hogan v. Dolphin Island Water and Water Auth., 409 So. 2d 1359, 1362 (Ala. 1982)(act allowing construction improvements of limited resort area had no geographical limitations and was therefore general law.); Milwaukee Brewers Baseball Club v. Wisconsin Dep't of Health and Social Serv., 130 W.2d 79, 387 N.W.2d 254, 272 (1986)(act based on geographical classification was valid because its provisions addressed a statewide concern).

[105] O. REYNOLDS, *supra* note 9, § 33, at 90-91. *See, e.g.* Higgins v. Johnson County Comm'rs, 153 Kan. 560, 112 P.2d 128, 129 (1949)(statute applying only to such counties bordering on two cities each with population of 115,000 upheld); State *ex rel.* Bowker v. Wright, 54 N.J.L. 130, 23 A. 116, 117-18 (1891) (statute limited to cities on ocean upheld).

[106] MCQUILLAN , *supra* note 1, § 4.59, at 104. *See, e.g.*, City of New Orleans v. Treen, 431 So. 2d 390, 394-95 (La. 1983)(act requiring only New Orleans residents to fund park excluded others who derived park benefits, therefore, law was invalidated as local law); State v. Labaure, 359 So. 2d 181, 182-83 (La. 1978)(law prohibiting use of gill nets in only two counties was invalid because it created closed class).

[107] 1 C. SANDS & M. LIBONATI, *supra* note 11, § 3.30, at 3-116.

[108] 234 Miss. 788, 108 So. 2d 390 (1959).

[109] *Culley*, 243 Miss. at 799, 108 So. at 392. The district would eventually lead to the development of the Ross Barnett Reservoir, just north of Jackson. *Id.* at 806, 108 So. 2d at 395.

ders the Pearl River" could be included in the district.[110] The act was challenged as being in violation of Miss. Const. art. IV, § 90.[111] The Mississippi Supreme Court disagreed, noting that section 90 does not prevent a reasonable classification that has some reasonable basis in fact.[112] While recognizing that a law was general and uniform if it operated on every person brought into a valid classification,[113] the court reasoned that the Pearl River was in a unique position.[114] The court held that the classification was justified because the river served a large number of people, and met the geological, health, industrial, recreation, and water-supply needs of a broad area of the state.[115] The act was found to be constitutionally valid and the district was found to be properly created.[116]

Delta & Pine Land Co. v. Board of Supervisors of Bolivar County[117] involved disputed leases of sixteenth section lands in Bolivar County.[118] A statute allowed the sixteenth section lands within a levee district to be leased but not those lands within a city, town or village.[119] The statute was challenged as containing an unreasonable classification in violation of Miss. Const. art. IV, § 90.[120] The court noted that the constitution[121] recognized the division of the alluvium land[122] of the state into two levee districts, and stated that the statute dealt with the land itself and that the classification was germane to the subject matter.[123]

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[110] *Id.* at 810, 108 So. 2d at 397. Thirteen counties came within the definition. *Id.*

[111] *Id.* at 809-10, 108 So. 2d at 397. Specifically, appellants asserted the act was in violation of paragraphs (1), (m), (q), (r), and (u) of MISS. CONST. art. IV, § 90. *Culley*, 234 Miss. at 809-10, 108 So. 2d at 397; *see supra* note 29.

[112] *Culley*, 234 Miss. at 810, 108 So. 2d at 397.

[113] *Id.*

[114] *Id.*

[115] *Id.* at 810-11, 108 So. 2d at 397-98.

[116] *Id.* at 821, 108 So. 2d at 403.

[117] 228 So. 2d 893 (Miss. 1969).

[118] *Delta & Pine Land*, 228 So. 2d at 894.

[119] *Id.*

[120] *Id.* at 895; *see supra* note 29.

[121] MISS. CONST. art. XI, § 228. This section divides the alluvial land into the Yazoo-Mississippi Delta Levee District and the Mississippi Levee District. *Id.*

[122] *Delta & Pine Land*, 228 So. 2d at 895. "Alluvium lands, of course, are those built by deposits from streams and flood, being the sediment from such water, on a valley floor." *Id.*

[123] *Id.*

The court reasoned that the protection of property and lives, and the different type of soil involved made the classification reasonable.[124] The court found the subject matter of the act involved was germane to the legislation and concluded that the statute was constitutional.[125]

One technique that is often used by the legislature is to couch an act in general terms but to pinpoint the area of its operation by referring to any county in which two specifically named roads intersect. Such was the case in *Lovorn v. Hathorn*.[126] In *Lovorn*, the statute at issue provided that "in any county . . . in which Highways 14 and 15 intersect, one (1) trustee shall be elected . . . ."[127] The classification included only Winston County.[128] The court recounted its responsibility to separate the valid part of a statute from the invalid part, if possible,[129] and to uphold the valid portion.[130] The court concluded that the portion of the statute reading "in which Highways 14 and 15 intersect" should be stricken as unconstitutional and left the remaining provisions of the law intact.[131]

3. *Named Individual or Unit of Government*

An act relating to a local government unit by name has been said to be a form of identification rather than classification.[132]

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[124] *Id.* at 895-96.

[125] *Id.*

[126] 365 So. 2d at 947 (Miss. 1978).

[127] *Lovorn*, 365 So. 2d at 948. The statute in question was MISS. CODE ANN. § 37-7-203 (1972) as amended. Lovorn, 365 So. 2d at 948.

[128] *Id.*

[129] *Id.; see* Wilson v. Jones County Bd. of Supervisors, 342 So. 2d 1293, 1296 (Miss. 1977)(court's duty in deciding constitutionality of statute is to separate valid part and uphold if possible unless clear that legislature intended parts as whole and would not have enacted separately).

[130] *Lovorn*, 365 So. 2d at 948.

[131] *Id.* at 950; *accord* Wilson v. Jones County Bd. of Supervisors, 342 So. 2d 1293, 1296 (1977)(designation of county by reference to highways did not bar rational relationship to purpose of statute; designation held unconstitutional); Smith v. Transcontinental Gas Pipeline Corp., 310 So. 2d 281, 282, 285 (1975)(portion of act designating county by referring to intersection of highways void and unconstitutional); *cf.* Quinn v. Branning, 404 So. 2d 1018, 1020 (1981)(statute language "unless permission is granted within a county wherein highway 15 and I-20 intersect," was stricken as unconstitutional part of statute).

[132] SUTHERLAND, *supra* note 1, § 40.08, at 164; *see* Horack, *supra* note 63 at 127-32

An act referring to a city by name and restricted in operation to that city has normally been deemed a local or special law.[133] Even so, the act may be held valid unless it is in violation of a constitutional provision banning local legislation on the subject matter.[134]

In *Giles v. City of Biloxi*,[135] an act was passed that gave the City of Biloxi authority to establish the Biloxi Bridge and Park Commission.[136] The Commission was given authority to sue, to be sued, to contract and to acquire, lease and dispose of land.[137] The Commission entered into a contract with a private firm for the development of Deer Island, by which the Commission would acquire seventy percent of the island and build a bridge to it, and the firm would develop the island.[138] The act was challenged as being violative of Miss. Const. art. IV, § 90.[139] The court noted that the act authorized the Commission to sell or lease the property, but reasoned that in either case the Commission would be granting lands in violation of section 90.[140] The court pointed out that the act had been published as a local and private law and that it was limited by its terms to one municipality.[141]

(discussing classification v. identification).

[133] McQUILLIN, *supra* note 1, § 4.56, at 101; *see* Haas v. Hancock, 183 Miss. 365, 184 So. 812, 813 (1938)(defines local and public law); Feemster v. City of Tupelo, 121 Miss. 733, 83 So. 804, 806 (1920)(stating that section 87 prohibition against special or local law does not apply to municipal corporations).

[134] SUTHERLAND, *supra* note 1, § 40.08, at 164, *see* Williamson v. Howell, 155 Miss. 270, 124 So. 319, 321 (1929)(holding law invalid which conferred special privileges on schools).

[135] 237 Miss. 65, 112 So. 2d 815, *suggestion of error overruled*, 237 Miss. 65, 113 So. 2d 544 (1959).

[136] *Giles*, 237 Miss. at 73, 112 So. 2d at 816.

[137] *Id.* at 73-75, 112 So. 2d at 816-17.

[138] *Id.* at 76-78, 112 So. 2d at 818-19. The decision to develop the island was based on the fact that Biloxi was becoming overcrowded and losing tourist dollars because of a lack of facilities. *Id.* at 80, 112 So. 2d at 821.

[139] *Id.* at 86, 112 So. 2d at 823; *see supra* note 29.

[140] *Id.* at 87-88, 112 So. 2d at 823-24. Although the act allowed the Commission to lease land, section 90 prohibited the granting of lands to any person or corporation. *Id.* at 86, 112 So. 2d at 823. The Court stated that the word "grant" used in this section applied to all conveyances; therefore, the conveyance of land from the commission to the corporation violated section 90(a). *Id.* at 86-87, 112 So. 2d at 823-24.

[141] *Id.* at 87, 112 So. 2d at 824.

Rolph v. Board of Trustees of Forrest County General Hospital[142] concerned the sovereign immunity of county hospitals. In *Rolph*, the plaintiff filed a negligence suit against the hospital, and the suit was dismissed by the trial court on the grounds that the hospital had sovereign immunity.[143] The plaintiff challenged the act, under which the county hospital claimed immunity, as being violative of Miss. Const. art. IV, § 87.[144] The act in question authorized the Board of Trustees of Forrest County General Hospital, by name, to waive the immunity of the hospital under certain circumstances.[145] The court found that the act was intended to be and was a local and private act, as it only related to Forrest County General Hospital.[146] Between the passage of the local act and the suit, Miss. Code Ann. § 41-13-37 (1972) was enacted, which is a general law providing for the extent of waiver of liability of county hospitals.[147] The court recognized that the act in question provided an exception to the general law in favor of the hospital and that no rational justification existed for the disparate treatment.[148] Thus, the act was unconstitutional, and the case was remanded for trial on the merits.[149]

Laws, however, have not always been overturned simply because they were designated local and private. For example, *Harris v. Harrison County Board of Supervisors*[150] revolved around a local and private act that authorized the Harrison County Board of Supervisors, by name, to take necessary measures to dispose of trash in the unincorporated areas of the county.[151]

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[142] 346 So. 2d 377 (Miss. 1977); *see* Pruett v. City of Rosedale, 421 So. 2d 1046 (1982)(ending doctrine of sovereign immunity).

[143] *Rolph*, 346 So. 2d at 378.

[144] *Id.; see supra* note 25.

[145] *Id.* at 379. These circumstances included suits for negligence and tortious acts committed by agents, servants or employees. *Id.*

[146] *Id.*

[147] *Id.* Section 41-13-37 provides that when a hospital takes insurance, it may be sued by anyone, but immunity is waived only to extent of coverage. MISS. CODE ANN. § 41-13-37 (1972).

[148] *Id.* at 379. The court cited *Smith*, 310 So. 2d at 285, for the proposition that countywide laws were prohibited. *Rolph*, 346 So. 2d at 379; *see supra* note 55-59 and accompanying text (discussing *Smith*).

[149] *Rolph*, 346 So. 2d at 379.

[150] 366 So. 2d 651 (Miss. 1979).

[151] *Harris*, 366 So. 2d.

The act was challenged as violative of section 112 of the Mississippi Constitution.[152] The court stated that section 112 was not applicable and also noted that construction of Miss. Const. art. IV, § 87 did not require the conclusion that all local and private laws violated the constitution.[153] The court reasoned that the sanitation problems existing in Harrison County could not be deemed a common characteristic or a classification for other counties,[154] and concluded that since the tax assessments for implementing the removal were equal and uniform throughout the disposal districts, the act did not violate section 87 or section 112 of the constitution.[155]

V. MISCELLANIA

A. Curative Acts

A curative law seeks to validate past governmental action which would be void but for the law.[156] Local officials often make good faith mistakes with regard to some procedure that must be carried out explicitly, and sometimes the legislature will respond by passing a curative act to attempt to authorize the action after the fact.[157] Also known as legalizing acts, they are subject to the constitutional prohibitions against special legislation.[158] Mississippi, unlike some jurisdictions, has not applied these prohibitions liberally when examining curative legislation.[159]

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[152] *Id.* at 653. Harris, who lived in Gulfport and did not own property in unincorporated areas, challenged the act under section 112 of the Mississippi Constitution. *Harris*, 366 So. 2d at 653. Section 112 provides in part, that "taxation shall be uniform and equal throughout the state . . . . Property shall be assessed for taxes under general laws and by uniform rules . . . ." *Id.*

[153] *Harris*, 366 So. 2d at 654-55; *see supra* notes 25 and 152.

[154] *Id.*

[155] *Id.* at 655.

[156] Curative laws are often passed to validate legal proceedings, instruments, or acts of a local government unit. 1 C. SANDS & M. LIBONATI, *supra* note 11, § 3.36, at 3-126.

[157] *See* Anderson, *Special Legislation in Minnesota*, 7 MINN. L. REV. 187, 188-91 (discussing curative laws as response to good faith mistake of elected official).

[158] SUTHERLAND, *supra* note 1, § 40.26, at 238.

[159] *Id.*

In *Miller v. Tucker*,[160] the state revenue agent sued past members of the Board of Supervisors of Warren County, seeking to recover funds paid out without proper authorization during their tenure.[161] Among these funds were monies paid to a local charitable organization for the purpose of aiding the poor.[162] The supervisors defended on the grounds that the Legislature ratified their action by the passage of a local and private law to that effect.[163] The court observed that a general law made the supervisors liable for any money paid out without authority, and held that the Legislature did not have power to discharge the supervisors from the operation of the general act.[164] Thus the local and private act was unconstitutional.[165]

In *Beall v. Board of Supervisors*,[166] the conflict was over reimbursement of the sheriff for purchases of disinfectant used in the county jail. The purchases were not authorized by the Board and it refused to reimburse the sheriff because it had no authority to do so.[167] Subsequently, a special act was passed,[168] purporting to empower the Board to pay the sheriff.[169] The court reasoned that the act was a local law benefitting one person where a general law was applicable.[170] The act was therefore void, as it violated Miss. Const. art. IV, § 87.[171]

B. Choice Between General and Local Acts

It does not necessarily follow that because a general law exists, a local and private law covering the same subject matter

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[160] 142 Miss. 146, 105 So. 774 (1925).

[161] *Miller*, 142 Miss. at 176-77, 105 So. at 776-77.

[162] *Id.* at 195, 105 So. at 784. The group was comprised of the King's Daughters and the Ladies of Charity. *Id.*

[163] *Id.* at 195, 198-99, 105 So. at 784.

[164] *Id.* at 198-99, 105 So. at 784.

[165] *Id.* at 199, 105 So. at 784.

[166] 191 Miss. 470, 3 So. 2d 839 (1941).

[167] *Beall*, 191 Miss. at 471

[168] The act involved was Chapter 586, Laws of 1940, Local and Private, adopted March 7, 1940. *Id.* at 478, 3 So. 2d at 840.

[169] *Id.* at 479, 3 So. 2d at 840.

[170] *Id.* at 488, 3 So. 2d at 844. The court observed that the act was local because it applied only to Warren County and private because it applied only to one person. *Id.*

[171] *Id.* at 489, 3 So. 2d at 844; *see supra* note 25.

will always be unconstitutional. In *In re Validation of $15,000,000 Hospital Revenue Bonds*,[172] the City of Hattiesburg was authorized to issue bonds to build a hospital by means of a local and private act.[173] The act was challenged as being violative of Miss. Const. art. IV, § 87, because general law provided a means by which the city could have acquired the hospital.[174] The court reasoned that the issue was whether the act suspended the general law: if so, it violated section 87; if not section 89 applied.[175] The court noted that the act specifically stated that it provided "an alternative method"[176] for building hospitals in the area, and the court held that the city could have proceded under the general law or the local law in constructing the facility.[177] Therefore, section 87 was not violated.[178]

In re Validation of $7,800,000 Combined Utility System Revenue Bond[179] presented the question of whether a local utility district could be organized under a local and private act when a general law existed that would accomplish the same purpose.[180] In 1966 a local act was passed, setting forth a scheme for the incorporation of utility districts in Jackson County.[181] In 1972, a general law was passed, effectuating the same policy and purpose.[182] The Gautier Utility District was organized in 1973

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[172] 361 So. 2d 44 (Miss. 1978).

[173] *In re* Validation of $15,000,000, 361 So. 2d at 45. The act in question was Chapter 947 of the Local and Private Laws of Mississippi of 1977.

[174] *Id.* at 47. MISS. CODE ANN. § 41-13-17 (1972) provided a means by which any political subdivision could cooperate with a non-profit corporation to construct hospital facilities.

[175] *In re Validation of $15,000,000*, 361 So. 2d at 47.

[176] *Id.* at 49. (quoting Act of Apr. 14, 1977, ch. 947, § 1, 1977 Miss. Loc. & Priv. Laws 95).

[177] *In re Validation of $15,000,000*, 361 So. 2d at 49. The court noted that the primary function of the facility was to serve the public and that it would be available to all. *Id.*

[178] *Id.*

[179] 465 So. 2d 1003 (1985).

[180] *In re Validation of $7,800,000*, 465 So. 2d at 1008.

[181] *Id.* at 1009. The Act of May 17, 1966, ch. 831, 1966 Miss. Loc. & Priv. Laws 52, provided for incorporation in no other counties. *In re Validation of $7,800,000*, 465 So. 2d at 1009.

[182] MISS. CODE ANN. §§ 19-5-151 to -207 (Supp. 1985). Justice Robertson speculated that the general act was modeled on the local act. *In re Validation of $7,800,000*, 465 So. 2d at 1009.

under the local act.[183] When the Board of Commissioners of the District decided to issue revenue bonds, the constitutionality of the District's organization was challenged under Miss. Const. art. IV, §§ 87, 90.[184] The court began its analysis by noting that section 87 had no application to a public utility district.[185] The court also pointed out that it was for the legislature to determine whether a matter would be dealt with by a local or general law, and that once the determination was made in favor of a local law, the court would not refuse to enforce it unless it violated Section 90.[186] Relying in part on *In re Validation of $15,000,000*, the court stated that the constitution did not prohibit the enactment of both a general law and a local and private law on the same subject matter.[187] The court then summarily dispatched the challenges under section 90[188] and held the creation of the District under the act to be constitutional.[189]

VI. Conclusion

Sections 87 through 90 of Article IV of the Mississippi Constiution of 1890 impose what appear to be rigid restrictions on the power of the legislature to enact special, local and private legislation.[190] Yet with the exception of certain enumerated cases, the legislature is given wide discretion in choosing the form with which to construct an act.[191] While giving lip service to the principle that general laws are preferred over private laws,[192] the court has repeatedly held that section 89 vests the

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[183] *In re Validation of $7,800,000*, 465 So. 2d at 1010.

[184] *Id.* at 1009.

[185] *Id.* at 1015; *see supra* note 27 (section 87 inapplicable to public bodies).

[186] *In re Validation of $7,800,000*, 465 So. 2d at 1016.

[187] *Id.* at 1016-17. The court found the principle to be particularly applicable where as here the difference in the two acts were primarily procedural or minor. *Id.* at 1016, 1016 n.5.

[188] *Id.* at 1017-18. The act had been challenged under paragraphs (d), (h), (o), and (r) of Section 90. *Id.* at 1018. The court stated, "Why they are even mentioned escapes us." *Id.*

[189] *Id.*

[190] *See supra* notes 25, 29, 30.

[191] Miss. Const. art. IV., § 90.

[192] *E.g., In re Validation of $7,800,000*, 465 So. 2d at 1016 (inclination of legal system is to prepare general laws).

responsibility of making that decision with the legislature.[193]

If a classification scheme is employed, it must be reasonable, but that requires only that the court conceive of any reasonable basis that the legislature might have thought of in drafting the statute.[194] To further confuse the issue, the court has not ruled consistently on similar classification schemes. For example in *Rolph* and *Smith* the court banned countywide laws that applied to one county and excluded the rest,[195] yet in *Harris* and *In re Validation of $7,800,000*, it approved of statutes that could only apply to the county that was named therein.[196]

To allow a local government entity to utilize a local and private law, as was done in *Harris* and *In re Validation of $7,800,000*, would seem to fly in the face of section 87, for surely if the local law is utilized, the general law is suspended with respect to that entity. Even with the guidelines provided by the court, the resolution of the issue of whether a law is permissible when viewed against the requirements of sections 87 through 90 appears to depend on the unique fact situations of each case. A clearer standard from the bench would be of great help to the student and practitioner as well.

O. Kendall Moore

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[193] *E.g., Harris*, 366 So. 2d at 654 (it is legislative duty to enact special law when necessary; court's opinion that general law was preferred was irrelevant).

[194] *See supra* notes 61 and 143 and accompanying text.

[195] *See supra* notes 55-59 and 142-49 and accompanying text.

[196] *See supra* notes 150-55 and 179-89 and accompanying text.

REEXAMINATION OF THE *ROBISON* TEST FOR SEAMAN STATUS

Recently, the Fifth Circuit has reexamined one of its landmark decisions in the area of admiralty, *Offshore Co. v. Robison.*[1] In that decision the court of appeals developed a test to determine whether an injured party was a seaman and thus entitled to Jones Act coverage.[2] The *Robison* criteria have been quoted in over ninety-five cases,[3] and analyzed frequently in law review articles.[4] Various courts have used the *Robison* criteria as an analytical starting point rather than an all-purpose formula [5] while other courts have emphasized different elements of the test according to the approach taken towards often complex

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[1] 266 F.2d 769 (5th Cir. 1959).

[2] *Id.* at 779. The Jones Act, 46 U.S.C. § 688 (Supp. 1986), affords relief to "[a]ny seaman who shall suffer injury in the course of his employment . . . ." In *Robison*, the Fifth Circuit concluded that:

> 1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and
>
> 2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

Robison, 266 F.2d at 779. Although the court expressed the test in terms of whether an evidentiary basis existed for the jury to determine seaman status, *Robison* effectively established a test for seaman status under the Jones Act in the Fifth Circuit. McDermott, Inc. v. Boudreaux, 769 F.2d 452, 457 (5th Cir. 1982).

[3] Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1073 (5th Cir. 1986). Since the Fifth Circuit rendered its decision in *Barrett*, *Robison* has continued to be extensively cited. *See, e.g.*, Patton-Tully Trans. Co. v. Ratliff, 797 F.2d 206, 210 (5th Cir. 1986)(following *Robison* test of seaman status); Pickle v. Int'l Oilfield Divers, Inc., 791 F.2d 1237, 1239 (5th Cir. 1986)(explaining *Robison* two-prong test for categorizing maritime worker as Jones Act seaman).

[4] *See, e.g.*, Robertson, *Current Problems in Seamen's Remedies: Seaman Status, Relationship Between Jones Act and LHWCA and Unseaworthiness Actions by Workers Not Covered by LHWCA*, 45 La. L. Rev. 875 (1985) [hereinafter cited as Robertson, *Current Problems in Seamen's Status Remedies*]; Engerrand and Bale, *Seaman Status Reconsidered*, 24 S. Tex. L.J. 431 (1983); Murphy, *Symposium on Admiralty*, 29 Loy. L., Rev. 537 (1983).

[5] Brown v. ITT Rayonier, Inc., 497 F.2d 234, 237 (5th Cir. 1974).

modern maritime fact situations.[6]

The reconstruction of the *Robison* criteria occurred in *Barrett v. Chevron U.S.A., Inc.*[7]. In *Barrett*, which was decided on the basis of *Robison*, a welder's helper was held to be a seaman and was entitled to recover under the Jones Act.[8] The worker was engaged in repairing a small, fixed off-shore platform. He was injured aboard the barge which was attached to the platform to provide a work space.[9] A strong dissent, coupled with growing concern over the expansion of seaman status and the inconsistent application of *Robison* led the Fifth Circuit to grant a rehearing en banc of the *Barrett* decision.[10] In *Barrett II*,[11] the court reaffirmed the suitability of *Robison* principles for determining seaman status and established guidelines for applying the test.[12] Ultimately the court concluded that since Barrett did not perform a substantial part of his work aboard a vessel or fleet of vessels then the district court's determination of seaman status was erroneous.[13]

Barrett II did not go far enough in resolving inconsistencies which have developed from expansion of the *Robison* criteria or in establishing clear guidelines for the application of those criteria. The unlimited liability of employers for Jones Act negligence claims and the broad interpretation given the term "seaman," encourage plaintiffs to pursue Jones Act claims rather than seek the limited compensation provided for longshoremen.

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[6] *Barrett v. Cheveron U.S.A.*, 781 F.2d 1067, 1073, (5th Cir. 1986).

[7] 752 F.2d 129 (5th Cir. 1985), *reh'g en banc granted*, 752 F.2d 137 (5th Cir. 1985), *rev'd*, 781 F.2d 1067 (5th Cir. 1986).

[8] *Barrett*, 752 F.2d at 135.

[9] *Id.* at 131-32.

[10] *Id.* at 137.

[11] 781 F.2d 1067 (5th Cir. 1986), *rev'g* 752 F.2d 129 (1985).

[12] *Barrett*, 781 F.2d at 1073-76. In deciding whether a worker should be considered a seaman it must be shown that the claimant performed a significant portion of his work aboard the vessel with a degree of regularity and continuity. *Id.* at 1074-75. Consideration should also be given to whether the claimant performed a substantial portion of his duties aboard a vessel or an identifiable group of vessels. This determination should be made in the context of the claimant's entire employment. *Id.* at 1075-76.

[13] *Id.* at 1076. The court concluded that Barrett's vessel-related duties were insignificant when compared to his entire term of employment. *Id.* It was found by the court that during Barrett's one year employment as a welder's helper he performed no more than twenty to thirty percent of his work on vessels.

Consequently, a "substantial volume of depressing litigation"[14] crowds the court dockets and burdens an already litigious society. Nevertheless, there is authority supporting *Robison* and its progeny which has imparted broad application to the term "seaman." A review of the history of the Jones Act, the Longshoremen and Harborworkers' Compensation Act and the Supreme Court decisions leading to *Robison* will illustrate the development of our modern, expanded definition of "seaman."

I. Early Seamen's Remedies and Enactment of the Jones Act

The law has historically accorded seamen special protection because of their regular exposure to the perils of the sea, strange diseases in foreign ports, exhausting labor and other hazards connected with long ocean voyages. Seamen have often been described as the "wards" of the admiralty court.[15] Prior to Congress' enactment of the Jones Act[16] and the Longshoremen and Harborworkers' Compensation Act[17] [hereinafter referred to as LHWCA], a maritime employee's status as "seaman" was important in determining whether he was entitled to recover for maintenance and cure and unseaworthiness. Early cases concerning seaman status concentrated on the navigational duties of the worker.[18] This test was later expanded to include members of the ship's company whose duties contributed to the operation and welfare of the ship upon her voyage,[19] although unrelated to

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[14] G. Gilmore & C.L. Black, Jr., The Law of Admiralty 328 (2d ed. 1981).

[15] Justice Story, in his capacity as Circuit Justice, explained the policy reasons underlying admiralty law's generous remedies for seamen in Harden v. Gordon, 11 F. Cas. 480, 483, 485 (C.C.D. Me. 1823)(No. 6,047).

[16] 46 U.S.C. § 688 (Supp. 1986).

[17] 33 U.S.C. §§ 901-905 (1986).

[18] *See The Bound Crook*, 146 F. 160, 164 (D. Mass. 1906)("When the 'crews of a vessel' is referred to, those persons who naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board."); *The Canton*, 5 F. Cas. 29, 30 (D. Mass. 1858)(No. 2,388)(ordinary test of seamanship was worker's ability to "hand, reef and steer").

[19] *See The Buena Ventura*, 243 F. 797, 799 (S.D.N.Y. 1916)(contribution to operation and welfare of ship upon her voyage); *The J.S. Warden*, 175 F. 314, 315 (S.D.N.Y. 1910)("further the purposes of her voyage"); Saylor v. Taylor, 77 F. 476, 479 (4th Cir. 1896)(slightest contribution to accomplishment of main object in which vessel was engaged was sufficient); *The Ocean Spray*, 18 F. Cas. 558, 560 (D. Ore. 1876)(No.

navigation.[20]

Under general maritime law, seamen could not recover beyond maintenance and cure for injuries caused by the negligence of their fellow employees, and neither the vessel nor her owners were liable for injury caused by the negligent order of the master.[21] As ocean travel became a more common form of transportation, Congress, in 1915, responded to general safety concerns[22] with "an Act to promote the welfare of American seamen in the merchant marine of the United States."[23] One of the Act's provisions provided, that, in personal injury suits, seamen would not be held to be fellow-servants with those under their authority.[24] However, in *Chelentis v. Luckenbach S.S. Co.*,[25] the Su-

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10,412)(seamen were "co-laborers in the leading purpose of the voyage").

One author viewed this expansion of seaman status to be a result of progress and the changing conditions brought about by new inventions such as the steamship. E. BENDEDICT, THE AMERICAN ADMIRALTY § 241, at 134 (1st ed. 1850).

[20] *See, e.g., The Baron Napier*, 249 F. 126, 131-32 (4th Cir. 1918)(horsemen and muleteers); *The J.S. Warden*, 175 F. 314, 315 (S.D.N.Y. 1910)(bartenders); *The Wanderer*, 20 F. 655, 656 (C.C.D. La. 1880)(pursers); Allen v. Hallet, 1 F. Cas. 472, 473 (S.D.N.Y. 1849)(No. 223)(cooks and stewards).

[21] *The Osceola*, 189 U.S. 158, 175 (1903). By 1903, Justice Brown considered the law to be settled on the following points:

1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.
3. That all members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.
4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

Id. at 175 (citations omitted).

[22] *See* Engerrand and Bale, *supra* note 4, at 437 (concern for safety of ocean travel after sinking of *Titanic*, necessity for better-trained seamen, better life-saving equipment, and desire to abolish arrest and imprisonment as penalty for desertion led to passage of 1915 Act).

[23] Seaman's Act, Pub. L. No. 63-302, ch. 153, 38 Stat. 1164 (1915).

[24] 38 Stat. 1164 § 20 (1915). Section 20 provided, "That in any suit to recover damages for any injury sustained on board a vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority." *Id.*

preme Court held that the abrogation of the fellow-servant defense by the Act of 1915 did not change the general rule that there could be no recovery by the seaman for the negligence of the master or crew.[26] Congress' reaction to this decision was swift. In 1920, Congress passed an Act that specifically created a cause of action for "seamen" injured by the negligence of the owner, master or a fellow crew member.[27]

II. Development of LHWCA

A. Attempts at State Legislation

The increase of state legislation providing workmen's compensation to land-based laborers injured in the course of their employment, raised the question of whether land-based workers

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[25] 247 U.S. 372 (1918).

[26] *Id.* at 384. A fireman on the *J.L. Luckenbach*, was allegedly injured by the negligent order of a superior officer. *Id.* At common law the ship owner was only liable for failure to supply a seaworthy ship. *Id.* at 376. The theory behind this was that those aboard the vessel were fellow servants. *Id.* Any injury would have to be caused by the negligence of the injured or one of his fellow servants, thus there could be no recovery. *Id.* Section 20 of the Seamen's Act provided that those in command were not held to be fellow-servants with those under their authority. *Id.* However, the Court noted that maritime law imposed liability upon the ship owner to a member of the crew without regard to the relationship. *Id.* For this reason the Court concluded that it was of no consequence whether the alleged negligent order came from a fellow seaman or not. *Id.* Accordingly, the Court applied the common law rule that shipowners were not liable for the negligent injury of its crew members. *Id.*

[27] Act of June 5, 1920, ch. 250, § 33, 41 Stat. 988, 1007 (codified as amended at 46 U.S.C. § 688(a) (Supp. 1986)). Since its original introduction by Senator Wesley L. Jones on February 6, 1920, this section has been commonly referred to as the Jones Act. Specifically, it provides:

> (a) Any Seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and, in such action, all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and, in case of death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and, in such action, all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Id.

employed in traditionally maritime tasks could recover under these states laws. The Supreme Court had previously upheld admiralty jurisdiction over claims of land-based workers against their employers when the worker was injured while engaged in maritime employment on a vessel in navigable waters.[28] However, in *Southern Pacific Co. v. Jensen*,[29] the Supreme Court jealously guarded federal jurisdiction over such claims and pronounced that individual states could not pass legislation which interferred with the uniformity of general maritime law.[30] The concurrent jurisdiction of state courts with admiralty under the "savings to suitors" clause included only remedies known at common law. Since state workmen's compensation laws were unknown at common law, then state courts could not enforce them through the "savings to suitors" clause.[31]

In an effort to afford longshoremen and stevedores the same remedies as other land-based workers, Congress attempted to expand the "savings to suitors" clause to include the rights and remedies provided under state workmen's compensation laws.[32] The Supreme Court struck down this legislation reasoning that since the Constitution granted Congress the power to legislate directly on maritime matters to promote uniformity, then any delegation of this power to individual states would promote discordant legislation throughout the Union.[33]

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[28] Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1914). The Court held that the worker could recover from his employer even though he was not entitled to recover from the vessel owner. *Id.* at 58. The Court determined that loading and unloading cargo was work formerly performed by the ship's crew; therefore, the work was clearly identified with maritime affairs and was covered by admiralty jurisdiction. *Id.* at 62. *See The Circassian*, 5 F. Cas. 702, 702 (E.D.N.Y. 1867)(No. 2,722)(longshoremen's work "as clearly identified with maritime affairs as are the mariners").

[29] 244 U.S. 205 (1917). Jensen was killed in an accident during the unloading operations on the vessel *El Oriente*. *Id.* at 208-09. His widow and children claimed compensation under the New York Workmen's Compensation Statute for his death.

[30] *Id.* at 217-18. The Court concluded that to hold otherwise would lead to the destruction of the uniformity Congress intended to create with respect to maritime matters. *Id.* at 217. The Court maintained that exclusive jurisdiction was vested in the Federal District Courts by way of Article III of the Constitution to prevent the freedom of navigation between the states and foreign countries from being severely restrained. *Id.* at 217-18.

[31] *Id.* at 217-18.

[32] Act of Oct. 6, 1917, ch. 97, 40 Stat. 395.

[33] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). Here, the Court first

B. Distinction Between Land-Based Workers and Seamen and Provision for Uniform Federal Compensation

Congress distinguished the rights and remedies of land-based workers and seamen by passing two separate acts. The Jones Act entitled seamen to recovery for injuries sustained in the course of employment.[34] Congress later attempted to complete this split and enacted legislation which once again expanded the "savings to suitors" clause. This change excluded masters and other members of a crew from recovery under state workmen's compensation laws.[35] In *Washington v. W.C. Dawson & Co.* the Supreme Court again struck down Congressional attempts to allow local laws to provide compensation to land-based workers.[36] The Court emphasized the need for uniformity of compensation provisions, the restrictions local statutes would place on national maritime commerce and indicated that a uniform federal compensation statute would be within the scope of Congressional power.[37]

Before Congress' attempts finally succeeded, the Supreme Court stepped in once again to permit land-based maritime workers recovery for work-related injury. In *International Stevedoring Co. v. Haverty*,[38] the Supreme Court held that a stevedore injured aboard a vessel was a "seaman" under the Jones Act and thus entitled to its protection.[39] Promptly, Congress enacted the Longshoremen and Harborworkers' Compen-

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hinted that, although Congress could not empower the states to provide workmen's compensation it could enact a uniform federal compensation act for maritime workers. *Id.* at 164.

[34] *Supra* note 27.

[35] Act of June 10, 1922, Pub. L. No. 67-234, 42 Stat. 634 (1922). Evidently, Congress felt the lack of distinction between land-based workers and seamen was the fatal flaw of the 1917 legislation which was struck down in *Jensen*. The legislators realized the desirability of uniform federal law to govern the recovery of migratory seamen. Legislatures also recognized the need to extend the benefits of local compensation laws to the land-based portworker, who was usually employed by independent contractors. S. REP. No. 94, 67th Cong., 1st Sess. 1 (1921). *See* H.R. REP. No. 639, 67th Cong., 2d Sess. 9, 62 CONG. REC. 7754 (1922)(statement of Rep. Volstead).

[36] 264 U.S. 219 (1924).

[37] *Id.* at 227-28. The Court noted that Congress had the power to revise the maritime law; however, these powers could not be delegated to the states. *Id.*

[38] 272 U.S. 50 (1926).

[39] *Id.* at 52.

sation Act which provided a uniform federal compensation award system for land-based maritime workers injured upon the navigable waters of the United States.[40] The act distinguished these land-based workers from seamen, partly because of opposition from seamen's unions.[41] Additionally, the act excluded "masters or members of a crew" from coverage under the LHWCA.[42]

III. Supreme Court and Early Fifth Circuit Formulations of Seaman Status and "Member of a Crew" Tests

Although not the initial interpretation by the courts, the terms "seaman" and "member of a crew" have been considered synonymous.[43] *South Chicago Coal & Dock Co. v. Bassett*,[44] afforded the Supreme Court its first opportunity to interpret the latter term under the LHWCA. In *Bassett*, the Court acknowledged that Congress had purposely substituted the term "member of the crew" for "seaman" in passing the LHWCA.[45] Apparently Congress had used "member of the crew" in recognition of the Court's previous holding that a longshoreman might be considered a seaman in some circumstances.[46] The term was intended only to exclude from the LHWCA those persons who were actual members of a crew. Recognizing the various interpretations that had been given the term "crew,"[47] the Court em-

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[40] Longshoremen and Harborworkers' Compensation Act, Pub. L. No. 69-803, 44 Stat. 1424 (1927)(codified as amended at 33 U.S.C. §§ 901-905 (1986)).

[41] 68 Cong. Rec. 2191-92 (1927). The Seamen's Union objected to the inclusion of "seamen" in the bill on the grounds that there were conditions which would be impossible for seamen to obey at all times. *Id.* at 2192. The union feared that failure to follow these conditions would disqualify the seamen from all compensation and from the opportunity to secure damages through a court. *Id.*

[42] 33 U.S.C. §§ 902(3), 903(a) (1).

[43] Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946), established the rule that the terms are equivalent and Congress intended the Jones Act and the LHWCA to be mutually exclusive. *Id.* at 7-8. For subsequent decisions interpreting the two terms as equivalent, see McDermott, Inc. v. Boudreaux, 679 F.2d 452, 455 (5th Cir. 1982); Travelers Ins. Co. v. Belair, 412 F.2d 297, 302 (1st Cir. 1969) and Hardaway Contracting Co. v. O'Keefe, 414 F.2d 657, 659-60 (5th Cir. 1968).

[44] 309 U.S. 251 (1940).

[45] *Id.* at 257.

[46] *Id.* (citing International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926)).

[47] *Bassett*, 309 U.S. at 258-60. The Court pointed out that often the question of

phasized the need to define statutory terms in light of the purpose of the statute involved.[48] The Court defined the word "crew" as referring to those workers who were naturally and primarily on board to aid in the vessel's navigation.[49]

The Court began to use the terms "seaman" and "member of a crew" interchangeably in *Norton v. Warner Co.*[50] Rather than restrict the historically broad definition of a seaman, the Court concluded that the term "member of the crew" under the LHWCA should be accorded the same comprehensive meaning as the term "seaman".[51] In *Norton*, the worker's coverage under LHWCA was challenged. While the worker had no strictly navigational duties on the barge where he worked, his duties did consist of general care and maintenance of the barge, and while he was not required to handle cargo and had no duties ashore, he ate and slept on the barge.[52] Upon consideration of these facts the court concluded that the "aid in navigation" requirement embraced any worker who "at all times contributes to and labors about the operation and welfare of the ship when she is upon the voyage.[53] Favoring this broad definition of the term "crew" and emphasizing the worker's "permanent attachment" to the vessel,[54] the Court found that the worker was a "member of the crew," and excluded him from the LHWCA coverage. Alternatively, his recovery was proper under the Jones Act.[55]

Another consideration for establishing seaman status subsequently espoused by the Supreme Court required that the

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whether a worker is a "member of a crew" cannot be concluded as a matter of law. *Id.* at 258. "The word 'crew' does not have an absolutely unvarying legal significance." *Id.*

[48] *Id.* at 259.

[49] *Id.* at 260. The Court considered the worker's duties aboard the vessel and the undisputed fact that he performed no navigational tasks, but only facilitated the flow of coal from a lighter on which he worked to the vessel being fueled. *Id.* In deference to the Deputy Commissioner's finding, the Court concluded that Bassett was merely a casual worker on the water and, as such, as not a "member of a crew" excluded from the coverage under the LHWCA. *Id.*

[50] 321 U.S. 565 (1944). In its opinion the court tacitly acknowledged Congress' apparent intent to render the Jones Act and LHWCA mutually exclusive. *Id.* at 569 n.3.

[51] *Id.* at 570-71.

[52] *Id.* at 567.

[53] *Id.* at 572 (quoting *The Buena Ventura*, 243 F. 797, 799 (S.D.N.Y. 1916)).

[54] *Id.*

[55] *Id.* at 573.

worker be connected with a "vessel engaged in navigation."[56] In *Desper v. Starved Rock Ferry Co.*,[57] Desper was employed to prepare ships for the summer season when injured.[58] These shoreside repairs were normally performed by "exclusively shore-based personnel."[59] The Court reasoned that since "there was no vessel engaged in navigation at the time of decedent's death," then, as a matter of law, Desper was not a seaman.[60]

IV. Liberal Application of the Three Factor Test

A combination of events set the stage for the lower courts to expand the "member of a crew" exclusion in the LHWCA to include the broad definition of "seaman" which was applied by the courts prior to the enactment of the LHWCA.[61] Primarily they were the Supreme Court's requirement that the worker be connected with a "vessel engaged in navigation[62], their pronouncement that "member of the crew" and "seaman" were synonymous[63] and the Court's tacit recognition of Congress' intent that the LHWCA and the Jones Act remedies be mutually exclusive.[64]

A considerable number of the lower courts began their analysis of seaman status with the test first formulated by the First Circuit in *Carumbo v. Cape Cod S.S. Co.*[65] This test defined a "member of the crew" as one who is aboard a vessel in navigation, has a more or less permanent connection with the ship and

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[56] Subsequent decisions have applied the "vessel in navigation" requirement set forth in Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952). *See, e.g.*, Powers v. Bethlehem Steel Corp., 477 F.2d 643, 647 (1st Cir. 1973)("vessel" interpreted liberally but must have a transportation function); Roper v. United States, 368 U.S. 20, 23 (1961)(ship used primarily as floating warehouse, not as means of transportation); Butler v. Whiteman, 356 U.S. 271, 271 (1958) (evidentiary basis existed to enable jury to find tug was vessel in navigation).

[57] 342 U.S. 187 (1952).

[58] *Id.* at 188.

[59] *Id.* at 190.

[60] *Id.* at 191-92.

[61] *See* Engerrand and Bale, *supra* note 4, at 467 (Supreme Court led way to interpretation of term "crew" to encompass broader term of "seamen").

[62] *See supra* note 56-60 and accompanying text.

[63] *See supra* note 43, 50-55 and accompanying text.

[64] Swanson v. Marra Bros., Inc., 328 U.S. 1, 7-8 (1946).

[65] 123 F.2d 991 (1st Cir. 1941).

is aboard primarily to aid in navigation.[66]

Amidst efforts by the lower courts to solidify the definition of a seaman the Supreme Court continued to emphasize that the question of seaman status was a determination for the trier of fact.[67] In *Senko v. LaCrosse Dredging Corp.*,[68] the Court unequivocally stated that "a jury's decision [of whether an injured person is a "member of the crew"]" is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate."[69]

Following its pronouncements in *Senko* the Supreme Court rendered two additional decisions on seaman status which also turned on the Court's conclusion that the jury's findings on seaman status had a sufficient evidentiary basis in the record. In *Grimes v. Raymond Concrete Pile Co.*,[70] Grimes had helped construct a radar tower and stayed aboard the tower as it was towed out to sea. As a pile driver, his duties were to assist in permanently affixing the tower to the ocean floor.[71] After a brief assignment to work on a nearby barge, Grimes was injured while

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[66] *Id.* at 995.

[67] *See Bassett*, 309 U.S. at 258 ("word 'crew' does not have an absolutely unvarying legal significance"); *Norton*, 321 U.S. at 568 (Deputy Commissioner's award should be given effect if there was evidence to support it). The Supreme Court, in a brief per curiam opinion, reversed the Fifth Circuit, giving directions to reinstate the jury's finding of seaman status. Gianfala v. Texas Co., 350 U.S. 879 (1955). Although the decedent, Gianfala, was a member of a drilling crew on a submersible drilling barge, evidently the Court felt there was sufficient evidence to support the jury's finding. *Id.*

[68] 352 U.S. 370 (1957). Senko, an employee of LaCrosse Dredging Corp. was responsible for the care and maintenance of a dredge. *Id.* at 372-73. He was injured in an accident which occurred onshore while the dredge was anchored and subsequently brought an action under the Jones Act in Illinois State Court. *Id.* at 371. Although Senko had never been on the dredge when it was in transit, evidence was introduced that when and if it had been moved he would have "a significant navigational function." *Id.* at 372-73. The jury concluded that Senko was a "member of the crew" and entitled to relief under the Jones Act. *Id.* at 371. The state appellate court reversed, believing the evidence insufficient to support the jury's finding of seaman's status. *Id.* The Supreme Court granted certiorari. *Id.*

[69] *Id.* at 374. The Court also dispelled any misconception that the occurrence of an injury on land or while a vessel was anchored or attached to land was material in reaching a finding of seamen's status. *Id.* at 373. The Court noted that "the duties of a man during a vessel's travel are relevant in determining whether he is a 'member of a crew' while the vessel is anchored." *Id.*

[70] 356 U.S. 252 (1958)(per curiam).

[71] *Id.* at 254-55 (Harlan, J., dissenting).

being transferred back to the tower.[72] Although the Court insisted that there existed a sufficient evidentiary basis for the jury's finding,[73] the majority did not explain on what basis the jury could have permissibly concluded that Grimes was a seaman.[74] In *Butler v. Whiteman*,[75] the Supreme Court reversed the district court's finding that there was an insufficient evidentiary basis for a jury to find that a worker cleaning the boilers on a tug that had been laid up ten months was a seaman.[76]

After *Butler*, the Supreme Court refused to hear cases concerning seaman status criteria, although they have touched on related matters in later decisions.[77] The development of the basic three-prong test was left to the lower courts on a case-by-case basis. Most decisions have emphasized the role of the jury as trier-of-fact in determining the issue, but the basic test has always been liberally construed. The "aid in navigation" part of the test in *Carumbo* was expanded to encompass all those workers who "contribute to and labor about the operation and welfare of the ship when she is upon her voyage."[78]

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[72] *Id.* at 254.

[73] *Id.* at 253.

[74] *See Grimes*, 356 U.S. at 255 (Harlan, J., dissenting)(questioning whether majority considered permanently-affixed tower manmade island or vessel and how temporary work on barge could make worker seaman). Justice Harlan felt that, if a jury could permissibly find Grimes a seaman on those grounds, then "seaman" would "mean nothing more than a person injured while working at sea." *Id.*

[75] 356 U.S. 271 (1958).

[76] *Id.*

[77] *See, e.g.*, Braen v. Pfeifer Oil Trans. Co., 361 U.S. 129, 132-33 (1959)(injured while not on vessel immaterial if acting in course of employment within meaning of Jones Act).

[78] *Norton*, 321 U.S. at 572 (quoting *The Buena Ventura*, 243 F. 797, 799). Cases expanding upon the "aid in navigation" requirement were scattered throughout the circuits. *See, e.g.*, Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383, 388 (6th Cir. 1953)("aid in navigation" test applicable to "all whose duties contribute to the operation and welfare of the vessel"), *cert. denied*, 346 U.S. 817 (1953); Jeffrey v. Henderson Bros., Inc., 193 F.2d 589, 592-93 (4th Cir. 1951)(seamen to include all persons employed to serve in any capacity on board vessel); Gahagan Constr. Corp. v. Armad, 165 F.2d 301, 306 (1st Cir. 1948)("crew includes all those who contribute to and labor about the operation and welfare of the ship"); Schantz v. American Dredging Co., 138 F.2d 534, 537 (3d Cir. 1943)("crew" includes those on board "naturally and primarily to aid in vessel's navigation"); Osland v. Star Fish Oyster Co., 107 F.2d 113, 114 (5th Cir. 1939)(term "seamen" includes "all those on board whose labor contributes to the accomplishment of the main object in which the vessel is engaged").

V. Development of the Fifth Circuit's Expansive Test of Seaman Status: *Offshore Co. v. Robison*

In the year following the last of the Supreme Court decisions addressing seaman status the Fifth Circuit, in *Robison*[79] stepped beyond a liberal application of the *Carumbo* test and articulated a new test[80] for seaman status. The Court of Appeals felt their new criteria more accurately reflected the Supreme Court's intent and the circuit courts' application of the law.[81]

The Fifth Circuit began by examining the cases cited in one of the Supreme Court's per curiam reversals of a Fifth Circuit case.[82] This comprehensive analysis revealed that all of the cited cases[83] involved special purpose structures which did not fit the conventional concept of a "vessel" as a means of transportation on water. Additionally, none of the claimants were of the type conventionally described as being aboard "primarily in aid of navigation."[84] The *Robison* court also reviewed *Senko, Grimes*, and *Butler*,[85] commenting on the *Senko* expansion of the "aid in navigation" test[86] and the emphasis in *Grimes* and *Butler* on the proper deference to be given the findings of the jury.[87] The court noted that, while there may be situations where, as a matter of law, the evidence is insufficient to permit a finding of seaman

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[79] 266 F.2d 769 (5th Cir. 1959).

[80] *Id.* at 779. *Robison* effectively established the test for seaman status under the Jones Act in the Fifth Circuit. McDermott, Inc. v. Boudreaux, 679 F.2d 452, 457-58 (5th Cir. 1982). The Fifth Circuit continues to quote the basic *Carumbo* test as adopted by the Fifth Circuit prior to *Robison*, but follows *Robison* standards in their application of the three-prong test. *Id.* at 457. One commentator suggests that this approach creates confusion as to which test to apply in the Fifth Circuit. Engerrand and Bale, *supra* note 4, at 470.

[81] *Robison*, 266 F.2d at 780-81.

[82] *Id.* at 774-76. The Fifth Circuit considered the key case concerning possible seamen status of offshore oilfield workers to be Gianfala v. Texas Co., 350 U.S. 879 (1955). *Id.* at 774.

[83] *Robison*, 266 F.2d at 774-75. *Gianfala* cited Wilkes v. Mississippi River & Gravel Co., 202 F.2d 383, (6th Cir. 1953); Summerlin v. Massman Constr. Co., 199 F.2d 715 (4th Cir. 1952); Gahagan Constr. Corp. v. Armad, 165 F.2d 301 (1st Cir. 1948); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940).

[84] *Robison*, 266 F.2d at 776.

[85] *Id.* at 776-78.

[86] *Robison*, 266 F.2d at 777; *see also supra* notes 68-69 and accompanying text.

[87] *Robison*, 266 F.2d at 778; *see also supra* notes 70-75 and accompanying text.

status, these cases are rare.[88] Accordingly, the court held that there is an evidentiary basis for a Jones Act case to go to the jury:

> (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel;

and

> (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.[89]

Although Robison was a roughneck on a submersible drilling barge[90] and had no navigational duties[91] the court felt that the "aid in navigation" criterion had been watered down to the point of losing its natural meaning.[92] It replaced this test with the "contribution to the vessel's mission" part of *Robison*. This change was justifiable because of the historically liberal construction given the Jones Act, the natural development of the law and the development of unconventional vessels in connection with off-shore drilling operations.[93] Workers aboard these vessels were exposed to the same marine risks as blue-water sailors and should be afforded the same protections.[94]

VI. Expansion of *Robison*

Robison has continued to be the predominant case in deter-

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[88] *Robison*, 266 F.2d at 778.
[89] *Id.* at 779.
[90] *Id.* at 771.
[91] *Id.* at 772.
[92] *Id.* at 780.
[93] *Id.*
[94] *Id.*

mining seaman status. However, the principles initially espoused have been expanded. The nature of the off-shore drilling industry, the specialized watercraft designed to facilitate these operations and the ingenuity of counsel for maritime employees have all combined to create situations where workers are classified as seamen by way of a judicial gloss on *Robison*.[95] Each element has been amplified or amended through various interpretations. The result is a complex and unpredictable state of the law regarding seaman status determination.

A. Of "Vessels" and "Special Purpose Structures"

Workers on off-shore fixed platforms are not considered seamen since fixed platforms are not "vessels in navigation."[96] Individuals employed aboard submersible drilling rigs may be considered seamen if they satisfy the other criteria for determining seaman status.[97] Apparently, since the moveable rigs are exposed to the hazards of the sea[98] and are capable of floating from place to place on water,[99] they are considered "vessels in navigation." Decisions interpreting this element of *Robison* have not been entirely consistent. The few problems seem to have occurred where vessels have been withdrawn from navigation or special-function structures are used in harbor work. For example, in *Powers v. Bethlehem Steel Corp.*,[100] a float was used as a work space for repairing a pier.[101] The float was customarily attached to the pier unless it was hauled or paddled along or un-

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[95] *Id. See* Robertson, *Current Problems in Seaman's Remedies, supra* note 4, at 883 (*Robison* criteria expanded to accommodate new cases).

[96] Prinzi v. Keydril Co., 738 F.2d 707, 710 (5th Cir. 1984).

[97] Producers Drilling Co. v. Gray, 361 F.2d 432, 436-37 (5th Cir. 1966). *See* Colomb v. Texaco, Inc., 736 F.2d 218, 220 (5th Cir. 1984)(worker permanently attached to inland submersible drilling barge held "seaman" as matter of law).

[99] Powers v. Bethlehem Steel Corp., 477 F.2d 643, 647 (lst Cir. 1973), *cert. denied*, 414 U.S. 856 (1973). *See* Offshore Co. v. Robison, 266 F.2d 769, 772, 779 (5th Cir. 1959)(mobile drilling platform, with retractable legs and raked bow, carrying navigation lights, bitts, anchors, bilge pumps, and cranes, was a vessel not man-made island).

[99] Fixed drilling platforms which are immobile are considered artificial islands. *See* The Outer Continental Shelf Act, 67 Stat. 462, 43 U.S.C. § 1333(a) (1982)(permanently fixed offshore installations removed from admiralty jurisdiction).

[100] 477 F.2d 643 (lst Cir.), *cert. denied*, 414 U.S. 856 (1973).

[101] *Id.* at 645.

derneath the pier, or if it was occasionally towed from pier to pier or through the harbor.[102] The First Circuit outlined the state of the law in an excellent treatment of the case and concluded that the movement of the float was not navigation.[103] The court stated that "the purpose and business of the present craft was not the transportation of passengers, cargo, or equipment from place to place across navigable waters."[104] The vessel was used for nothing more than to provide a stable working platform and was indistinguishable from a floating dry dock.[105] While reserving the question of whether the float would have temporarily attained vessel status while being towed for some distance,[106] the court distinguished such movement[107] from the type involved in hauling the float under or along a pier. The court stated that, even if the jury had found that the worker had been injured during such an operation such movement would not be enough to constitute "navigation."[108]

Other cases involving special function harbor craft have concentrated on the mobility of the structure.[109] These opinions make it clear that the transportation function of the structure is not considered "incidental."[110] In *Salgado v. M.J. Rudolph*

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[102] *Id.* at 647.

[103] *Id.*

[104] *Id. See The Robert W. Parsons*, 191 U.S. 17, 30 (1903)(factors in determining vessel status in question of admiralty jurisdiction are "purpose for which the craft was constructed and the business in which it is engaged").

[105] *Powers*, 477 F.2d at 647 (relying on Cook v. Belden Concrete Prods., Inc., 472 F.2d 999, 100 n.5 (5th Cir. 1973), which held floating construction platform indistinguishable from floating dry dock, which is not a vessel).

[106] *Powers*, 477 F.2d at 648 (citing United States v. Moran Towing & Transp. Co., 374 F.2d 656 (4th Cir. 1967)).

[107] *Id.* at 647. If the structure were moved some distance offshore and "exposed to the hazards of the sea," it might be considered a vessel. *Id.*

[108] *Id.* at 648.

[109] *See, e.g.*, Senko v. LaCross Dredging Corp., 352 U.S. 370, 372 (1957)(dredge not frequently in transit still considered vessel); Norton v. Warner Co., 321 U.S. 565, 571 (1944)(barge without motive power of its own is vessel); Salgado v. M.J. Rudolph Corp., 514 F.2d 750, 755 (2d Cir. 1975)(although lacking motive power, mobile floating crane considered vessel); Peck v. United States Steel Corp., 315 F. Supp. 905, 906 (D. Minn. 1970), *aff'd*, 446 F.2d 891 (8th Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972)(floating derrick can be considered vessel although possessing no motive power of its own).

[110] *See* Brunet v. Boh Bros. Constr. Co., 715 F.2d 196, 198 (5th Cir. 1983)(transportation function of pile-driving barge not so incidental as to warrant conclusion that barge not vessel). *But see* Barrios v. Engine & Gas Compressor Servs., Inc., 669 F.2d 350, 353

Corp.[111] the Second Circuit briefly concluded that a floating crane with no connection to the shore more closely resembled a vessel than a floating dry dock.[112] However, the Fifth Circuit held that the question of whether a pile-driving crane barge is a vessel should be for the jury in *Brunet v. Boh Brothers Construction Co.*[113] The court of appeals suggested that the function of the vessel may have been more to support the crane than transport it, but the transportation function was not merely incidental.[114] One member of the Fifth Circuit has gone so far as to suggest that both "the three men in a tub" and "Jonah inside the whale" would fit the current definition of a vessel.[115]

The *Powers* rationale seems to be persuasive in these situations.[116] However, the above cases show how the "purpose and business of the craft"[117] can be viewed differently by various courts. Some courts might consider that floating cranes or pile-driving crane barges were merely structures intended to provide a work space, especially in view of the fact that other structures with similar characteristics have been held to be nonvessels.[118]

B. Of "Permanency" and "Substantial Work"

While the definition of a "vessel in navigation" for Jones Act purposes has been expanded since passage of the Act, the

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(5th Cir. 1982)(citing Blanchard v. Engine & Gas Compressor Servs., Inc., 575 F.2d 1140, 1143 (5th Cir. 1978)("mere flotation on water does not constitute a structure a vessel")); Smith v. Massman Const. Co., 607 F.2d 87, 88 (5th Cir. 1979)(caisson was not "intended" to carry men or equipment and if any such transportation occurred it was incidental).

[111] 514 F.2d 750 (2d Cir. 1975).

[112] *Id.* at 755.

[113] 715 F.2d 196 (5th Cir. 1983).

[114] *Id.* at 198.

[115] Burks v. American River Transp. Co., 679 F.2d 69, 75 (5th Cir. 1982).

[116] *See generally* Engerrand & Bale, *supra* note 4, at 473 n.364 (general listing of cases in which special purposes harbor craft have not satisfied the transportation function test). *See also* Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 261 U.S. 19, 22 (1926)(wharfboat "did not encounter perils of navigation to which craft used for transportation are exposed").

[117] *Powers*, 477 F.2d at 647.

[118] *See, e.g.*, Watkins v. Pentzien, Inc., 660 F.2d 604, 606-08 (5th Cir. 1981)(construction platform not vessel), *cert. denied*, 456 U.S. 944 (1982); Leonard v Exxon Corp., 581 F.2d 522, 524 (5th Cir. 1978)(floating construction platform not vessel), *cert. denied*, 441 U.S. 923 (1979); Fleming v Port Allen Marine Serv., Inc., 552 F. Supp. 27, 28-30 (M.D.La. 1982)(floating work flat did not have transportation function).

element of *Robison* that seems to have been extended to its limits is the permanent assignment/substantial work requirement. Two distinct lines of cases have emerged which considerably expand that criterion. In *Braniff v. Jackson Avenue-Gretna Ferry, Inc.*[119] a maintenance superintendent hired to oversee the regular upkeep of his employer's ferries was allowed to recover for Jones Act negligence even though he had never been assigned to a particular vessel.[120] Judge John R. Brown of the Fifth Circuit found no compelling reason for denying seaman status to one whose duties otherwise met the *Robison* requirements merely because he or she was permanently assigned or performed a substantial part of his or her work aboard several specified vessels rather than one particular vessel.[121]

This broadened concept of the permanent assignment/substantial work requirement later developed into the extension of seaman status to those who have a substantial relationship with an identifiable vessel or group of vessels which is not spasmodic.[122] Expansion of this line of cases lent support to the Fifth Circuit's reversal of *Bertrand v. International Mooring & Marine, Inc.*[123] In *Bertrand* the district court held that a worker was required to be connected with a fleet "identifiable by common ownership or control.[124] *Bertrand* also provided some authority for extending seaman status to those who may be working aboard numerous unrelated vessels merely as an incident of

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[119] 280 F.2d 523 (5th Cir. 1960).

[120] *Id.* at 526.

[121] *Id.* at 528.

[122] *See* Guidry v. Continental Oil Co., 640 F.2d 523, 529 (5th Cir.) (member of casing crew's assignments were "random," not on "continuing and regular basis"), *cert. denied*, 454 U.S. 818 (1981). This case cut back on the expansive interpretation of a "fleet" in Higginbotham v. Mobil Oil Corp., 545 F.2d 422 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978). There, although the worker involved was killed in a helicopter crash while being transported to work aboard a fixed platform, the Fifth Circuit overruled the district court's holding that the worker was not a seaman. *Id.* at 433. The circuit court found that the worker "spent all but a small fraction of his working time on Mobil's submersible drilling barges." *Id.* Yet, one commentator has pointed out that, according to the record, only one of the rigs was owned by Mobil, and the worker spent more time on land and fixed platforms than he did on submersible rigs. Engerrand & Bale, *supra* note 4, at 486 (citing *Higginbotham*, 545 F.2d at 422).

[123] 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 464 S. Ct. 1069 (1984).

[124] Bertrand v. Int'l Mooring & Marine, Inc., 517 F. Supp. 342, 347 (W.D.La. 1981), *rev'd* 700 F.2d 240, 245 (5th Cir. 1983), *cert. denied*, 464 S. Ct. 1069 (1984).

their work.[125] This result was not inconsistent with the practical application of the identifiable fleet requirement.[126] The sole reason workers were not regularly aboard vessels under common ownership or control in *Bertrand* was because the plaintiff's employer had arranged for each customer to provide transportation to the work-site aboard their own workboats.[127] Since these workers were regularly exposed to the same perils of the sea as "blue water seamen,"[128] and they regularly performed "classical seaman's work,"[129] the court concluded that the identifiable fleet requirement was met notwithstanding the absence of common ownership or control.[130] Fortunately, this further complication in the application of the *Robison* criteria has not been interpreted by the courts as dispensing with the identifiable fleet requirement.[131] Thus *Bertrand* has virtually been limited to its facts.[132]

Another expansion of the permanent assignment/substantial work prong of the *Robison* test has involved situations where a worker performs part of his work aboard a fixed platform (*not* a vessel) and a portion of his work aboard a vessel adjacent to the

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[125] *See* Engerrand & Bale, *supra* note 4, at 489-90 (*Bertrand* analysis allows longshoreman types who work and spend time upon numerous vessels, to attain seaman status, dispensing with fundamental permanency requirement of seaman status by expanding fleet concept).

[126] *Bertrand*, 700 F.2d at 246. The court conceded that as the number of vessels increases and the time spent on each decreases the connection between work assignment and vessels becomes more tenuous. *Id.*

[127] *Id.* at 248. The employer's contractual arrangements kept work from being performed on fleet of vessels under common ownership or control, although it normally would have been, due to nature of plaintiff's work. *Id.*

[128] *Id.* at 245 (quoting lower court opinion).

[129] *Id.*

[130] *Id.* at 246.

[131] Some cases have resulted in summary judgments for the defendants in part because of lack of plaintiff's assignment to or work upon an identifiable fleet. These cases have stressed the fact that *Bertrand* did not dispense with the identifiable fleet who perform the work of blue water seaman yet do not work aboard a fleet under common ownership or control merely because of their employer's contractual arrangements, not because of the nature of their work. *See* Buras v. Commercial Testing & Eng'g Co., 736 F.2d 307, 312 (5th Cir. 1984) (*Bertrand* refused to deny seaman status because of mere happenstance of particular ownership or chartering arrangement); White v. Valley Line Co. 736 F.2d 304, 307 (5th Cir. 1984)("*Bertrand* did not eradicate the concept of an identifiable fleet").

[132] *See* Buras v. Commercial Testing & Eng'g Co., 736 F.2d 307, 311 (*Bertrand* must be read in light of factual situation it involved).

platform. *Noble Drilling Corp. v. Smith*[133] allowed a worker on a fixed drilling platform who was assigned to operate the mud pump on a tender alongside the platform to recover under the Jones Act.[134] Although his injury occurred on the platform, the court found that Smith spent a substantial amount of his time working aboard the vessel.[135] Additionally, his primary duties contributed to the mission of the vessel.[136] Evidently, even though a worker may be assigned to a fixed platform, he may still attain seaman status if it can be proved that a substantial amount of his work is performed on a tender alongside the platform.[137] The result may be different when a worker who performs the same tasks spends more of his time working on the platform than on the tender.[138] In *Johnson v. Noble Drilling Co.*[139] a "mud man" aboard a fixed drilling rig was injured while opening a can of chemicals used to treat the drilling mud.[140] The plaintiff in *Johnson* was also injured aboard the platform, but he slept and ate aboard the vessel and performed many of the same tasks as did the "mud man" in *Noble*.[141] In *Johnson* the court denied the worker seaman status for two reasons. First, because more of his actual work time was spent aboard the platform than aboard the vessel and second, he had never been specifically required to operate the mud pumps aboard the tender.[142] This distinction appears to be rather tenuous since both workers were probably exposed to the same risks due to the hazards of the sea.

Even when a worker, performing the work of a seaman, is aboard one of the tenders his assignment may not be sufficiently

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[133] 412 F.2d 952 (5th Cir.), *cert. denied*, 396 U.S. 906 (1969).

[134] *Noble Drilling*, 412 F.2d at 956.

[135] *Id.*

[136] *Id.*

[137] *Id.* at 957. *See* Creel v. Drill Tender *Jack Cleverly*, 264 F. Supp. 98, 101 (W.D. La. 1966)("mud man" who was "member of the crew" of tender was allowed to recover under Jones Act even though his injury occurred on fixed platform).

[138] *See* Johnson v. Noble Drilling Co., 264 F. Supp. 104, 107 (W.D.La. 1966)(both Johnson and plaintiff in *Noble* were "mud men").

[139] 264 F. Supp. 104 (W.D.La. 1966).

[140] *Id.* at 105.

[141] *Id.* at 106-07.

[142] *Id.* at 107.

permanent, nor a substantial enough part of his employment, for him to achieve seaman status.[143] In *Longmire v. Sea Drilling Corp.*[144] a roughneck assigned to a fixed drilling platform was injured aboard a tender anchored alongside the platform.[145] Longmire's duties had necessarily placed him on the tender from time to time.[146] While the drilling rig was dismantled, Longmire, aboard the tender, was injured while stowing the anchor chain, a traditional seaman's task.[147] The *Longmire* court acknowledged that an informal temporary change of duties might be sufficient to immediately accord seaman's status. However, this result was not accepted since the court refused to view the circumstances of the claimant's injury in isolation.[148]

The decisions in these cases may not seem contrary to *Robison* principles, but the outcome of a particular case often hinges on seemingly trivial factual differences in the circumstances of an employee's duties. A worker performing the same tasks on a platform as one on a tender will be denied seaman status, even if both were actually injured on the platform.[149] Specifically, *Longmire* emphasized the need for courts to analyze the employee's position as a whole when applying the permanent assignment/substantial work requirement thereby avoiding unwarranted emphasis on any one particular aspect of the individual's job.[150]

C. Of "Contributions to the Function of the Vessel"

The *Carumbo* test requiring that a worker be aboard primarily to aid in navigation was expanded considerably in *Robison.*[151] Yet, the Supreme Court has not addressed the issue.[152]

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[143] *See* Longmire v. Sea Drilling Corp., 610 F. 2d 1342, 1347 (5th Cir. 1980)(incidental activities aboard tender not sufficient when viewed in context of entire employment). *But see* Keener v. Transworld Drilling Co., 468 F.2d 729, 731 (5th Cir. 1972)(court in dicta suggested that performance of seaman's work may have been sufficient to afford plaintiff seaman's status during period he was occupied with such tasks).

[144] 610 F.2d 1342 (5th Cir. 1980).

[145] *Id.* at 1344.

[146] *Id.* at 1346.

[147] *Id.* at 1347.

[148] *Id.* at 1347 n.6.

[149] *See supra* note 133-37 and accompanying text.

[150] *Longmire*, 610 F.2d at 1347.

[151] *See* Offshore Co. v. Robison, 266 F.2d 769, 779-80 (5th Cir. 1959)(*Carumbo* re-

There is conflict within the circuits concerning whether this aspect of seaman status requires the worker to contribute to a significant navigational function of the vessel or whether it merely requires that the worker contribute to the special mission of the vessel.[153] In *Johnson v. John F. Beasley Construction Co.*[154] the Seventh Circuit criticized the *Robison* requirement[155] that a worker contribute to the "function of the vessel or the accomplishment of its mission."[156] It considered this requirement too broad. Furthermore, the court believed that the requirement overlooked Jones Act principles concerning the transportation function of the vessel.[157] The Seventh Circuit accordingly concluded that since an ironworker on a construction barge had no significant navigational tasks and therefore did not contribute to the "*transportation function of the barge then he should not be accorded seaman status.*"[158]

The Fifth Circuit continues to adhere to the *Robison* "contribute to the vessel's function or mission" requirement. Usually, this requirement goes hand-in-hand with the permanent assign-

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quirement that worker be 'aboard primarily in aid of navigation' had been "watered down until the words have lost their natural meaning," (citing Carumbo v. Cape Cod S.S. Co., 123 F.2d 991, 995 (1st Cir. 1984)).

[152] Since 1958, the Supreme Court has refused to hear seaman status cases. Engerrand & Bale, *supra* note 4, at 455 n.188.

[153] *See* Harney v. William M. Moore Bldg. Corp. 359 F.2d 649, 655 (2d Cir. 1966)(unclear whether duties which contribute to mission of vessel but not to functioning of vessel itself lead to "salty inference"). *Compare* Johnson v. John F. Beasley, 742 F.2d 1054, 1061 (7th Cir. 1984)("employee's relation to transportation function of vessel" should determine seaman status for Jones Act purposes) *and* Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 37-38 (3d Cir. 1975)(worker performed insignificant amount of navigational functions and his primary duties involved handling cargo) *and* Simko v. C & C Marine Maintenance Co. , 594 F.2d 960, 965 (3d Cir. 1979)(citing *Griffith's* holding that maritime worker who does not go to sea must have performed significant navigational function with respect to that vessel) *with* Offshore Co. v. Robison, 266 F.2d 769, 780 (worker must contribute to function of vessel or accomplishment of its mission or operation and welfare of vessel in terms of maintenance).

[154] 742 F.2d 1054 (7th Cir. 1984).

[155] *Id.* at 1061.

[156] *Robison*, 266 F.2d at 777.

[157] *Johnson*, 742 F.2d at 1061. The court in *Johnson* felt that the Fifth Circuit based too much of its analysis on the Supreme Court's per curiam opinions and failed to consider the explicit statement of *Senko* regarding the "significant navigational function" requirement. *Id.*

[158] *Id.* at 1064.

ment/substantial work prong of *Robison*.[159] However, the former requirement is easily manipulated by applying a more narrow or more broad definition of the mission of the vessel according to the circumstances of the case.[160] As in the passenger cases,[161] the determination of whether a worker contributes to the function or mission of a vessel hinges on the labelling of that function or mission. In *Dove v. Belcher Oil Co.*,[162] the plaintiff was captain of a tug chartered by Dow Chemical and was indisputably a seaman as to that vessel.[163] Dove was injured aboard a motorboat to which he was assigned in order to meet an incoming tow and relay a message concerning docking and unloading instructions.[164] The Fifth Circuit held against affording seaman status reasoning that Dove was merely performing a task that could have as easily been performed by a passenger.[165] The court applied *Robison* in reaching their decision and accused the claimant of using semantic gymnastics in his attempt to label the vessel's mission as delivering dock instructions. The court found that this definition was too broad.[166] The refusal to allow

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[159] *Robison*, 266 F.2d at 779.

[160] *See* Barrett v. Chevron U.S.A., Inc., 752 F.2d 129, 137 (5th Cir.), (Jolly J., dissenting)(mission of vessel was to provide work space, and all plaintiff did was work in space provided just as passenger aboard cruise ship occupies space), *reh'g en banc granted*, 752 F.2d 136 (5th Cir. 1985), *rev'd*, 781 F.2d 1067 (5th Cir. 1986).

[161] *See, e.g.*, Dove v. Belcher Oil Co., 686 F.2d 329, 332-34 (5th Cir. 1982)(tugboat captain delivering docking instructions to tow was merely passenger of motorboat transporting him to tow). *But see* Coulter v. Texaco, Inc., 714 F.2d 467, 469 (5th Cir. 1983)(worker on land-based drilling rig contributed to function of vessel used to transport workers and equipment to drill site); Mungia v. Chevron U.S.A., Inc., 675 F.2d 630, 631-33 (worker classified as roustabout on fixed platforms contributed to function of Jo-Boats on which he traveled to and from well structures and various platforms).

[162] 686 F.2d 329 (5th Cir. 1982).

[163] *Id.* at 330. Larry Dove was an employee of Berwick Bay Oil Co. and acted as captain of the *M/V PISCES*, a tug chartered by Dow Chemical Co. *Id.*

[164] *Id.* at 331. Dove contended that he was a borrowed servant of Dow's at the time of his injury which resulted from the negligent act of one Herrerd, an agent of Dow Chemical. *Id.* He further argued that the motorboat the *THELMA*, on which he was a passenger, was unseaworthy. *Id.*

[165] *Id.* at 333. The court stated that since Dove was not given the mission of a seaman then he could not be classified as such on the basis of his status as a seaman on the *PICES*.

[166] *Id.* at 334. The court stated that such a manipulation of the "accomplishment of its mission" language would, in the extreme, allow passengers on cruise boats to contend that they were aiding in the ship's mission, that of making money. *Id.*

seaman status, although supposedly hinging on the fact that Dove was a mere passenger aboard the motorboat, is hard to reconcile with the later case of *Coulter v. Texaco, Inc.*[167] In *Coulter* the plaintiff was assigned to an oil rig located on an island. For every seven day work period he had to be transported to the job site aboard a Texaco vessel.[168] The court emphasized the fact that the boat carried Coulter's tools and his noon-day meal and that transportation to that oil field was possible only by boat.[169] Additionally, some of plaintiff's work was performed on the deck of the vessel.[170] The court found there was a sufficient basis for a reasonable jury to conclude that Coulter was a seaman not a mere passenger, and that he contributed to the function of that fleet of vessels.[171]

VII. Recent Affirmation of *Robison* and Guidelines for its Application

Although the contribution to the function or the mission of the vessel requirement may be manipulated, many of the cases do not hinge on a single prong of the *Robison* test. Cases where the interpretation of one part is stretched usually occur when the other requirement is clearly met.[172] Although parts of *Robison* still must be satisfied,[173] the courts may actually be balanc-

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[167] 714 F.2d 467 (5th Cir. 1983).

[168] *Id.* at 469. The facts showed that the sole means of traveling from place to place was by boat. *Id.*

[169] *Id.* The court noted that the vessels were much more than sources of transportation. *Id.*

[170] *Id.* The undisputed facts were that the roustabouts often performed their work on the deck of the vessel and had job responsibilities connected to the operations and maintenance of the vessels. *Id.*

[171] *Id.* The court found that the evidence clearly demonstrated that Coulter was not only permanently assigned to one of the vessels, but also performed substantial work on board which contributed to the function of the vessels. *Id.*

[172] *See, e.g.*, Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240, 246-48 (5th Cir. 1983)(anchorhandler performing traditional seaman's task met permanent assignment to vessel requirement although worker was never assigned to particular vessel), *cert. denied*, 52 U.S.L.W. 3533 (U.S. Jan. 16, 1984); McDermott, Inc. v. Boudreaux, 679 F.2d 452, 456, 458-59 (5th Cir. 1982)(pipeline welder injured shortly after winter lay-off before being permanently reassigned to vessel was found to be seaman); Davis v. Hill Eng'g, Inc., 549 F.2d 314, 326-28 (5th Cir. 1977)(welder's helper permanently assigned to barge occasionally performed tasks which aided operation or welfare of vessel).

[173] *See* Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980)(worker stowing

ing the two in their *application* of the *Robison* criteria.

Barrett II, the Fifth Circuit's latest decision in this area, reaffirms the *Robison* expansion of the original "aid to navigation requirement"[174] and emphasizes the need in applying the permanent assignment/substantial work requirement to examine the context of the worker's entire employment.[175] Upon rehearing, the court traced the *Robison* principles back, once again, to the Supreme Court's initial seaman status decisions of *Bassett*,[176] *Norton*,[177] *Gianfala*,[178] *Senko*,[179] *Grimes*[180] and *Butler*.[181] Reaffirming the reasoning outlined in *Robison* for a broader test than that of "aid to navigation," as based on the Supreme Court's per curiam reversals,[182] the court rejected the Seventh Circuit's interpretation requiring the worker to contribute to the vessel's transportation function.[183]

The *Barrett II* court examined the various definitions the Fifth Circuit used to describe the permanent assignment/substantial work requirement.[184] The court came to the conclusion that since seaman status was generally a factual matter for the determination of the jury, then inconsistencies were merely an inherent part of such a system.[185] Further, since the Supreme Court had not seen fit to reverse *Robison* or attempted to recon-

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anchor chains aboard vessel was not afforded seaman status during his occupation merely because he performed traditional seaman's tasks); Brown v. ITT Rayonier, Inc., 497 F.2d 234, 238 (5th Cir. 1974)(employee's operation of motorboat in order to collect water samples was merely incidental to his employment).

[174] Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1073 (5th Cir. 1986).

[175] *Id.* at 1075.

[176] *Id.* at 1070 (citing South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940)).

[177] *Id.* at 1070 (citing Norton v. Warner Co., 321 U.S. 565 (1944)).

[178] *Id.* at 1071 (citing Gianfala v. Texas Co., 350 U.S. 879 (1955)).

[179] *Id.* at 1071 (citing Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957)).

[180] *Id.* at 1071 (citing Grimes v. Raymond Concrete Pile Co., 356 U.S. 252 (1958)).

[181] *Id.* at 1071-72 (citing Butler v. Whiteman, 356 U.S. 271 (1958)).

[182] *Id.* at 1073. *Robison*'s expansion of the "aid to navigation" requirement was based on *Gianfala*, *Grimes* and *Butler*. *See* Offshore Co. v. Robison, 266 F.2d at 774-78, 780 (5th Cir. 1959)(recent Supreme Court decisions and circuit cases had watered down "aid to navigation" until words lost their natural meaning).

[183] *Barrett*, 781 F.2d at 1073 (rejecting Johnson v. John F. Beasley Constr. Co., 742 F.2d 1054 (7th Cir. 1984)).

[184] *Id.* at 1073-74.

[185] *Id.* at 1074.

cile the inconsistent cases, the court concluded that that prong of *Robison* also should continue to stand as part of the seaman status test.[186] The court of appeals attempted to establish guidelines for the application of this prong of *Robison* by characterizing permanent assignment and substantial work as disjunctive (either/or) requirements[187] and using the permanency requirement to determine the period of time over which the substantiality of the worker's vessel-related duties should be measured.[188] If a worker's job assignment was "permanently" changed he might recover after a short period of time if his duties were to be substantially vessel-related for the duration of that assignment.[189] Citing *Longmire*, the court emphasized the need to consider all the circumstances of the worker employment.[190] Applying this type analysis to Barrett's situation, the court concluded that during his entire employment with Tilden J. Elliott Contractor, Inc. as a welder's helper, Barrett did not perform a substantial part of his work on a vessel or fleet of vessels.[191]

The type of factual analysis and language in *Barrett II* emphasizing determination of status based on the context of the worker's entire employment suggests what may be a trend towards a balancing or policy consideration approach to seaman status cases. One recent case which emphasizes a policy approach has been suggested as a possible substitute for *Robison*.[192] In *Wallace v. Oceaneering International*[193] the court emphasized the need to weigh the total circumstances of a case when examining a worker's "relation to the navigation of vessels and the perils attendant thereon."[194] There the court concluded that the plaintiff, a deep-sea diver, due to the nature of the tasks he performed, was regularly exposed to the hazards or per-

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[186] *Id.*

[187] *Id.* at 1073.

[188] *Id.* at 1075.

[189] *Id.* at 1075-76.

[190] *Id.* at 1075 (citing Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980)).

[191] *Id.* at 1076.

[192] *See* Robertson, *Current Problems in Seamen's Remedies, supra*, note 4, at 887 (Wallace v. Oceaneering Int'l, 727 F.2d 427 (5th Cir. 1984) contains ingredients for establishing new seaman status criteria).

[193] 727 F.2d 427 (5th Cir. 1984).

[194] *Id.* at 432-36.

ils of the sea and thus entitled to seaman status.[195]

Although their opinion makes no mention of *Wallace*, the *Barrett II* approach to *Robison*'s permanent assignment/substantial work requirement is similar to the *Wallace* analysis. Both cases emphasize the necessity of examining the total circumstances of each case.[196] Furthermore *Barrett II*, by utilizing an either/or approach to that prong of *Robison*,[197] may actually encourage balancing of the permanent assignment/substantial work requirement. Although *Wallace* emphasizes the regularity of exposure to the perils of the sea,[198] it also weighs factors such as whether a substantial part of the worker's duties are performed on vessels[199] and whether the tasks performed are inherently maritime and not merely fortuitously occurring upon a vessel.[200]

Barrett II, although it merely reaffirms the continued application of *Robison* as the prevailing seaman status test in the Fifth Circuit, is significant specifically because it solidifies that circuit's traditionally liberal approach to the Jones Act seaman status question and does not attempt to reconcile the inconsistencies arising from the application of *Robison*.[201] Much speculation was generated by the grant of rehearing for the original *Barrett*. Some may have hoped for a stricter test or a test which might be consistently applied and result in clearer guidelines for determination of status and less litigation surrounding the issue.[202] Unless the Supreme Court sees fit to break twenty-eight

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[195] *Id.*

[196] *See* Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1075 (5th Cir. 1986)(employee's seamen status determined in "context of his entire employment" (quoting Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980)); Wallace v. Oceaneering Int'l, 727 F.2d 427 (5th Cir. 1984)(individual's relationship to perils involved in navigation of vessels must be weighed according to total circumstances of situation).

[197] *Barrett*, 781 F.2d at 1073.

[198] *Wallace*, 727 F.2d at 433-34, 456.

[199] *Id.* at 436.

[200] *Id.*

[201] *Barrett*, 781 F.2d at 1074.

[202] *See* Engerrand and Bale, *supra* note 4, at 494 (Supreme Court's silence and existing circuit court decisions provide for myriad of standards and lack of uniformity in administering seaman status determinations); Gilmore & Black, *supra* note 14, at 328 (lack of Supreme Court guidance on seaman status has produced depressing volume of litigation); Robertson, *Current Problems in Seamen's Remedies*, *supra* note 4, at 892

years of silence concerning the issue, there will continue to be conflict within the circuits concerning construction of the "aid to navigation" requirement[203] and inconsistent results from application of the permanent assignment/substantial work prong of *Robison*.[204] Despite the fact that *Barrett II* fails to establish clear cut guidelines for a consistently applied test, it is unlikely the Supreme Court will step in. *Robison* is the familiar starting point in determining seaman status and, as pointed out in Justice Gee's concurring opinion, it may be more important to have a rule than to have the correct one.[205]

Virginia Carothers

(encouraging more emphasis on underlying policy of seaman's protections in order to produce clarity and predictability).

[203] *Compare* Offshore Co. v. Robison, 266 F.2d 768 (5th Cir. 1959)(expanding "aid to navigation" requirement to "contribute to function/accomplishment of mission of vessel" requirement) *with* Johnson v. John F. Beasley Constr. Co., 742 F.2d 1054 (7th Cir. 1984)("aid to navigation" should not have been expanded beyond requiring contribution to transportation function of vessel); Luckett v. Continental Eng'g Co., 649 F.2d 441 (6th Cir. 1981)(applying "aid to navigation" requirement and determining member of land survey team who was fortuitously aboard vessel not seaman); Griffith v. Wheeling Pittsburgh Steel Corp., 5211 F.2d 31 (3d Cir. 1975)(utilizing "aid to navigation" requirement and holding steel mill employee assigned to vessel through common labor pool not seaman); Lynn v. Heyl & Patterson, Inc., 483 F. Supp. 1247 (W.D. Pa. 1980)(ironworker on construction barge failed to meet "aid to navigation" requirement).

[204] *See supra* notes 119-31 (assignment to identifiable fleet expansion) and notes 131-50 (cases concerning mixed duties aboard tender and platform) and accompanying text.

[205] *Barrett*, 781 F.2d at 1076.

PUBLIC SECTOR COLLECTIVE BARGAINING IN MISSISSIPPI: AN ARGUMENT FOR ACCEPTANCE

I. Introduction

In the spring of 1985 Mississippi public school teachers engaged in a work stoppage which eventually affected fifty-seven school districts across the state[1] and involved some nine thousand teachers.[2] The teachers were asserting their interests in needed wage increases to the Mississippi Legislature which was then in session, and after three months of debate the legislature passed a wage increase bill.[3] At the same time the wage increase was granted, a harsh public employee anti-strike law was enacted in a reactionary response to the teachers' strikes.[4] At the time the strike occurred, there was no alternate procedure by which public employees could assert their interests collectively. Although the vast majority of states have recognized to some degree by statute the right of public employees to participate in the decision-making process and to bargain collectively,[5] Mississippi has not granted such rights to any of its public employees. Instead, Mississippi now prohibits public employees from asserting their interests by striking, but does not provide for any alternate means of collective communication. Statutorily authorized or proscribed collective bargaining should be considered as a means by which public employees could effectively communicate with their employer. This article will examine the importance of collective bargaining in both the private and public sectors. The traditional theories which have been used to oppose public sec-

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[1] The Clarion-Ledger, March 18, 1985, at A1, col. 2

[2] The Clarion-Ledger, Feb. 24, 1985, at A15, col. 2.

[3] Miss. Code Ann. § 37-19-7 (Supp. 1986).

[4] The Clarion-Ledger, Feb. 24, 1985, at A1, col. 2; *see* Miss. Code Ann. § 37-9-75 (Supp. 1986)(prohibiting strikes by teachers). The core of the anti-strike law was the section directed exclusively at teachers. Another provision of the Mississippi Code enacted by the legislature made that section applicable to all state public employees who work for any state governmental entity whose employees are paid in whole or in part by state funds. Miss. Code Ann. § 25-1-105 (Supp. 1986).

[5] *See infra* note 53 (listing state statutes that provide for collective bargaining).

tor collective bargaining will be discussed and critically analyzed. Mississippi's apparent reliance on these theories and opposition to public employee collectivism will be examined. In conclusion the writer will argue that collective bargaining is needed in Mississippi to facilitate communication between public employees and government and should be adopted by statute.

II. The Need for Collectiveness

The organization of American laborers into unified groups seeking common goals and possessing common interests cannot be viewed as a phenomenon independent of pre-development force or cause.[6] Labor began to act collectively out of a need to effectively respond to the growth of business[7] which had made individual communication with management practically useless.[8] In a similar fashion the organization of employees in the public sector has increased as government has grown.[9] An underlying

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[6] *See* H. Livesay, American Made Men Who Shaped the American Economy 15 (1979)(discussing impact of selected individuals on American economy). The author explained that "big labor emerged as a response to big business." *Id.*

[7] *See* Archibald Cox, C. Bok, R. Carman, Cases and Materials on Labor Law 7-8 (9th ed. 1981)(discussing business expansion after Civil War and before World War I). The years following the Civil War and prior to World War I witnessed significant corporate development and business expansion. *Id.* at 7. By 1910 the amount of capital investment had increased by 1100 percent from its level in 1860. *Id.* During the same years the work force in industry grew by 4,000,000 and the number of manufacturing establishments increased by some 30 percent. *Id.* This growth in industry had detrimental effects on labor's ability to effectively communicate with management on an individual basis. *Id.* The employment relationship was no longer a personal one. *Id.*

[8] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1936)(upholding validity of NLRA in context of employee discharge); American Steel Foundries v. Tri-City Council, 257 U.S. 184, 209 (1921)(interpreting § 20 of Clayton Act in context of union picketing). In *Jones & Laughlin Steel* the Court said, "[unions] were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer." *Jones & Laughlin Steel*, 301 U.S. at 33.

[9] Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 Minn. L. Rev. 1221, 1234 n.61 (1985); *see* Carpenter, *An Emperical Investigation of Municipal Personnel Practices in Mississippi*, 11 J.C.N.P.S. 59, 59 (1982)(citing 1979 statistics which indicated that public employees represented one-fifth of total work force and that 80% of those were employed by state or local governments); Coffinberger, *Why Public Employees Join Unions in a Non-bargaining Environment*, 10 J.C.N.P.S. 209, 209 (1981)(discussing growth of public employee unionization on state and local levels); Special Project, *Developments in the Law-Public Employment*, 97 Harv. L. Rev. 1611, 1614-15 (1984)(discussing growth of public employee unionization and government as em-

primary purpose of public employee unionization is the equalizing of employer-employee strengths, much as it was in the private sector, in order to prevent government as management from turning a deaf ear to employee needs and requests. Collective bargaining has been the means by which public employees have sought to achieve this objective.[10] The voice of one employee raised individually has little impact, and labor's organization in the public sector and assertion of the need for collective bargaining was a response, at least in part, to an employment relationship where the employees' interests were subordinated to government's authority.

III. The Role of Collective Bargaining in the Private Sector

Collective bargaining is an important element of federal labor law in the private sector[11] and is actually the objective to-

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ployer). Employees in public education have been very active in organizing, and unionization in public education has experienced significant growth in recent decades. Finch, *Collective Bargaining in the Public Schools: Reassessing Labor Policy in an Era of Reform*, 1984, 6 Wis. L. Rev. 1573, 1580 (1984). The increase in teacher organization was facilitated by professional associations like the National Education Association (NEA) and the American Federation of Teachers (AFT), a branch of the AFL-CIO, which emerged as a rival. *Id.* In his article Michael Finch reported that 88% of the nation's school teachers belong to either the NEA or the AFT and that 83% belong to local organizations. *Id.*

[10] *See* Barnum, *Labor Relations by Local Options: Fire Fighters and Police Bargaining in Texas*, 28 Lab. L.J. 293, 295 (1977)(discussing employees' reasons for wanting collective bargaining rights). A study of public employees in Texas examined specific reasons why local public employees sought collective bargaining rights. *Id.* The study reported that for 19 of 22 local groups questioned the major reason given was the need for more effective participation in the decisions which affected the employees. *Id.* In an investigation on the Virginia State Association of Professional Fire Fighters conducted by Richard Coffinberger, it was discovered that the principal motive for joining the union was the fire fighters' belief that government as management was unresponsive to their needs and requests. The employees as individuals simply felt that management was not listening to them and joined the union even though collective bargaining was not legally permissible in Virginia. The study revealed that employees in the public sector will seek collectiveness when government ceases to be adequately responsive to those employees. Coffinberger, *supra* note 9, at 213-15.

[11] The heart of the original National Labor Relations Act, the Wagner Act of 1935, was § 7 which provided that employees had the right to "bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . ." National Labor Relations (Wagner) Act § 7, 29

ward which the provisions of the National Labor Relations Act are directed.[12] Congress intended that in businesses covered by the NLRA, employees be able to elect a representative to collectively negotiate with the employer.[13] It was believed that industrial strife and labor disputes would be reduced and that some equality in the employment relationship would be achieved through collective bargaining.[14] The use of collective bargaining did in fact reduce labor disruptions and facilitated the substitution of industrial democracy for the unilateral and arbitrary power of the employer.[15]

IV. Collective Bargaining in the Public Sector

Collective bargaining is important in private sector labor relations because of the structure of federal labor law which operates to bring employee representatives and employers together

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U.S.C. § 157 (1982).

Employers covered by the NLRA are obligated to bargain collectively with the representatives of their employees, and failure to do so is an unfair labor practice. National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982). It is also an unfair labor practice for a labor organization representing employees covered by the NLRA to refuse to bargain with the employees' employer. National Labor Relations Act § 8(b)(3), 28 U.S.C. § 158(b)(3) (1982). Section 8(d) of the NLRA provides that collective bargaining means meeting at reasonable times and conferring in good faith with respect to mandatory subjects of bargaining. 28 U.S.C. § 158(d) (1982).

[12] *See* National Labor Relations Act § 8(a)(1), 28 U.S.C. § 158(a)(1) (1982)(prohibiting employer coercion of employees in exercising their § 7 rights); National Labor Relations Act § 8(a)(2), 28 U.S.C. § 158(a)(2) (1982)(prohibiting employer domination or interference with union formation or administration); National Labor Relations Act § 8(a)(3), 28 U.S.C. § 158(a)(3) (1982)(prohibiting employer influence on unionization by discrimination in hiring or firing); National Labor Relations Act § 8(a)(4), 28 U.S.C. § 158(a)(4) (1982)(prohibiting employer discrimination against employee for asserting rights before NLRB); National Labor Relations Act § 8(b)(1)(A), 28 U.S.C. § 158(b)(1)(A) (1982)(prohibiting union coercion of employees in exercising their § 7 rights); National Labor Relations Act § 8(b)(1)(B), 28 U.S.C. § (1982)(prohibiting union coercion of employer selection of representatives for collective bargaining).

[13] *See* Valley Mould & Iron Corp. v. NLRB, 116 F.2d 760, 764, *cert. denied*, 313 U.S. 590 (1941)(discussing purpose of NLRB in context of union election by steel workers.)

[14] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1936)(taking judicial notice that refusing to negotiate caused strike).

[15] *Cox, supra* note 7, at 75. *See* Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 Yale L.J. 1107, 111-12 (1959)(listing claims of success that are made for collective bargaining in private sector).

for the purpose of bargaining. However, Congress excluded the public sector from the coverage of the National Labor Relations Act.[16] In addition states are under no constitutional duty to bargain collectively or negotiate with employee labor organizations.[17] However, the rights of public employees to organize and to join a union as well as the right to elect a union as a representative for the purpose of collective bargaining are protected by the Constitution as fundamental rights.[18] But the right of mandatory collective bargaining is not given to state public employees by federal law[19] nor is it protected by the Constitution.[20]

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[16] National Labor Relations Act § 2(2), 28 U.S.C. § 152(2) (1985). "Employer" was defined in the Act to exclude the "United States or any wholly owned Government Corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." *Id.* Although Congress did not exclude public employees from the definition of "employee" in the Act, the public sector was effectively removed from the Acts' coverage, and state and local governments were exempted from the obligation to participate in collective bargaining. Special Project, *supra* note 9, at 1676.

[17] Minnesota Bd. for Community Colleges v. Knight, 465 U.S. 271, 283-85 (1984); Smith v. Arkansas State Highway Employees Local 1315, 441 U.S. 463, 465 (1979). In *Arkansas State Highway Employees*, a union sought to represent two employees of the state highway department, but the department refused to deal with the union and instead required employees to come directly to the department with complaints. *Id.* at 463. Although recognizing the public employees first amendment right to associate and speak, the Supreme Court held that the first amendment imposed no affirmative duty to listen or bargain with the union. *Id.* at 465; *see* Winston-Salem/Forsyth County Unit of the North Carolina Ass'n of Educators v. Phillips, 381 F. Supp. 644, 646 (M.D.N.C. 1974)(holding that state and county school administrations were under no constitutional duty to enter into contracts with teachers' union).

[18] Sikes v. Boone, 562 F. Supp. 74, 79 (N.D. Fla. 1983)(fundamental right of employees to organize, elect representatives, and bargain collectively not limited to private sector employees; citing WLRB v. Jones & Laughlin Steel Corp., 391 U.S. 1, 33 (1936)). *Cf* United Fed'n of Postal Clerks v. Blount, 3225 F. Supp. 879, 883 (D.D.C. 1971), *aff'd*, 404 U.S. 81 (1971)(fundamental right of public employees to organize not restricted by lack of fundamental right to strike).

In two cases involving the Hazlehurst Municipal School District, the Mississippi Supreme Court recognized these fundamental rights, and said it would be an impermissible infringement of constitutional rights if the cause for non-renewal was union activity. Tanner v. Hazlehurst Mun. Separate School Dist., 427 So. 2d 977, 979 (1983); Jackson v. Hazlehurst Mun. Separate School Dist., 427 So. 2d 134, 137 (1983).

[19] *See supra* note 16 and accompanying text (discussing public sector's exclusion from federal labor law).

[20] Smith v. Arkansas State Highway Employees Local 1315, 441 U.S. 463, 465 (1979); Lontine v. Van Cleave, 483 F.2d 966, 968 (10th Cir. 1973)(requirement of employer to bargain collectively does not necessarily follow from first amendment right to participate and remain in union).

Instead states are allowed to regulate public employee collective bargaining based on the states' own perceptions and policies.[21]

A. *Traditional Arguments Against Collective Bargaining in the Public Sector*

Historically, collective bargaining was viewed as inappropriate in the context of the government-public servant employment relationship.[22] The opposition to collective bargaining was not based on the character of the services being provided by government through its employees or the essentiality of such services,[23]

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[21] Comment, *An Analysis of the Comprehensive Approach to the Public-Employee Strike Problem*, 44 MISS. L.J. 766, 767 (1973).

[22] In 1937, President Franklin D. Roosevelt expressed the prevailing sentiment of the period in a letter to the President of the National Federation of Federal Employees:

> All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.

Letter from Franklin D. Roosevelt to Luther C. Stewart (Aug. 16, 1937), *reprinted in* C. RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW 436-37 (1946).

[23] The essentiality of government services was more often used as the basis for opposing public employees' right to strike. *See* County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees Ass'n Local 660, 38 Cal. 3d 564, 579, 69 P.2d 835, 846, 215 Cal. Rptr. 424, 434 (1985), *cert. denied*, 106 S. Ct. 408 (1986). Opponents of strikes by public employees feared that if public employees were allowed to withhold public services which were vital or services which have no alternative suppliers in the private sector, government would be forced to make excessive concessions. *See* Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 950 (1969)(discussing essentiality of services as factor in determining permissibility of strikes); Hanslowe, *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055, 1068 (1982)(discussing validity of basing opposition to public sector strikes on perceived essentiality of service involved).

The analysis that the ability to strike where essential government services are involved gives employees excessive leverage is incomplete at best. All government services cannot be viewed as essential. *County Sanitation District No. 2*, 38 Cal.3d at 379, 699 P.2d at 846, 214 Cal. Rptr. at 434. In addition private companies often perform services which are arguably essential such as city sanitation services, and yet these workers have the right to strike. *Id.* at 582, 699 P.2d at 847, 215 Cal. Rptr. at 437; *see* Hanslowe, at 1068-72 (discussing essentiality of governmental services).

but was predicated on the employing agency's character as government.[24]

The theories which focused on the public employer's distinction as government and which were used to prohibit collective bargaining can be divided into two doctrines—the sovereignty doctrine and the delegation doctrine.[25] The common law theory that the "king can do no wrong" was the underlying rationale of the sovereignty doctrine.[26] Under this doctrine the state or government was the supreme repository of all legal and political authority and, therefore, could not be compelled to accept an obligation against its will or be hindered in the exercise of its authority.[27] The sovereignty doctrine also created an implication that public employees as servants of the sovereign owed a duty of extra loyalty to the government and that this

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[24] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 229-30 (1977), *reh'g denied*, 433 U.S. 915 (1976)(stating that difference in public and private sector is character of employer); United States v. United Mine Workers of America, 330 U.S. 258, 275-76 (1947)(private sector labor law concepts not freely applicable to federal government performing managerial role). In *United Mine Workers* the federal government, pursuant to Executive Order 9728 of May 21, 1946, given to the Secretary of the Interior, took possession of the country's bituminous coal mines. *United Mine Workers*, 330 U.S. at 262 n.1. The takeover by the government was the result of the president's determination that labor disturbances were significantly threatening the production of coal needed in the post-war recovery. *Id.*. The government agreed that the existing terms and conditions of employment would remain in effect. *Id.* at 263. However, pursuant to the existing labor agreement, the government refused to meet with the mine workers' union to negotiate new terms. *Id.* at 264. A work stoppage resulted. *Id.* at 267. The Court ruled that the work stoppage was improper and not protected. *Id.* at 293. If the original private employer had been involved, the result would have been different. *Id.* Instead, although the services and work being performed had not changed, the Court refused to apply private labor law concepts simply because management was government. *Id. See generally* Hanslowe, *supra* note 23, at 1061 (discussing weakness of allowing governments' involvement to determine legal outcome).

[25] City of Fort Smith v. Council 38, AFSCME, 245 Ark. 409, 413-15, 433 S.W.2d 153, 155-56 (1968); City of Springfield v. Clouse, 356 Mo.1239, 1250, 1251-52, 206 S.W.2d 539, 544, 545-46 (1947); *see generally* Special Project, *supra* note 9, at 1676-77 (discussing theories upon which government bases opposition to collective bargaining).

[26] Teachers v. Bd. of Public Instruction, 69 *L.R.R.M.* 2446 (1968); Bd. of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965); Befort, *supra* note 9, at 1232.

[27] Norwalk Teachers Assoc. v. Bd. of Educ., 138 Conn. 269, 83 A.2d 483, 485 (1951). The theory that the sovereign's authority should not be impeded has also been used by opponents of public employees' right to strike. The theory is the same; the target is simply changed. *See generally*, Hanslowe, *supra* note 23, at 1061-62 (discussing sovereignty arguments in context of strikes).

duty would be breached if employees sought to protect their interests collectively.[28]

The other doctrine which provided a theoretical restraint to collective bargaining was the delegation doctrine.[29] Under this doctrine, government was viewed as possessing only that authority given to it by the people. The government was entrusted with the power to exercise that authority for the benefit of the people, and any grant of that authority was improper.[30] According to the rationale of the delegation doctrine, collective bargaining by its very nature would result in an illegal delegation of governmental authority to the party that sat with government at the negotiating table.[31] The delegation doctrine also held that collective bargaining would give public employees too much power and would undermine the democratic process.[32] It could not be

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[28] Gardner v. Broderick, 392 U.S. 273, 277-78 (1968); *see* Befort, *supra* note 9, at 1232 (stating that sovereignty doctrine implied that public employees as servants of sovereign owed duty of extra loyalty). For a discussion of governments' authority and public employees' implied duty of loyalty as elements of the sovereignty doctrine in the contest of public employee collectiveness, see Anderson, *supra* note 23, at 959.

[29] *See* Special Project, *supra* note 9, at 1676-77 (identifying delegation doctrine as theoretical argument against public sector collective bargaining).

[30] *See, e.g.*, Stone v. Mississippi, 101 U.S. 814, 820 (1979)(Court in dicta stated that power of governing is trust committed by people to government and no part can be granted away).

[31] *See* Newport News Fire Fighters Ass'n Local 795 v. City of Newport News, 339 F. Supp. 13, 16 (E.D. Va. 1972)(recognizing delegation doctrine argument as possible policy basis for opposing collective bargaining with police and firemen). In *Newport News* a city police and fireman's union sought to have the court direct the city to bargain collectively. *Id.* at 15. In rejecting the union's claim, the court stated that the city existed as an entity pursuant to a charter from the state, and the city's authority was limited to that granted by the charter which did not provide for collective bargaining. *Id.* at 6; *cf. infra* notes 62-73 and accompanying text (discussing ultra vires doctrine). Since the NLRA only gave the right of collective bargaining to the private sector, and the right was not found in the Constitution, then the court reasoned that the right must be provided by the state legislature. *Newport News*, 359 F. Supp. at 16. The court found no such provision and discussed possible policy arguments upon which the state opposed collective bargaining. *Id.* at 16. The court stated that one argument was that allowing the union to help decide on issues that were the legislature's perogative would be an illegal delegation of authority. *Id.* Perhaps uncomfortable with the broad harshness of the old delegation doctrine, the court noted that the scope of the bargaining could be restricted to permissible subjects so that some degree of collective bargaining would be feasible. *Id.*

[32] *See* Winston Salem/Forsyth County Unit of the North Carolina Ass'n of Educ., 381 F. Supp. 644, 647 (M.D.N.C. 1974)(recognizing delegation doctrine as policy basis for state statute invalidating contracts with public employee unions); Alley, *Collective Bargaining for Public Employees in Florida — In Need of a Popular Vote*, 56 FLA. BAR J.

denied that public employees had an interest in negotiating with government in the context of their employment relationship just as labor in the private sector sought to approach management collectively with disputes and requests. But while government was an employer in the same manner that private sector management was an employer, collective bargaining with government would affect or actually be part of the political process.[33] It was argued that collective bargaining was in essence a type of pressure that was appropriate in the private sector where economic forces were acceptable factors, but was inappropriate in the public sector where the forces involved were political rather than economic in nature.[34] According to the argument, collective bargaining would improperly influence government's decisions and, thereby, distort the democratic system.[35] Public employees operating as a special interest group would arguably have the exclusive ability to force government to a negotiating table and would have excessive input in decision making.[36]

715, 716 (1982)(arguing that collective bargaining inappropriately delegates too much political power to unions); *see also*, Special Project, *Collective Bargaining and Politics in Public Employment*, 19 U.C.L.A. L. Rev. 887, 1034-43 (1972)(discussing basis of opponents' argument that collective bargaining would give unions too much power); *cf.* Hanslowe, *supra* note 23, at 1062 (discussing government's argument that allowing strikes would give employees too much power and would distort normal political process).

[33] Alley, *supra* note 32 at 716; *see generally* Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156, 1156-61 (1974)(discussing collective bargaining as method of political decision making).

[34] Alley, *supra* note 32 at 716.

[35] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 227-28 (1977)(discussing nonunion public employees' opposition to unions authorized by state statute). However, the economic and political characteristics of the private and public sectors respectively were emphasized more often and more clearly in the context of strikes. *Compare* United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 884 (D.D.C. 1971), *aff'd*, 404 U.S. 802 (1971)(strikes are economic pressure and are inappropriate in influencing political decisions); *and* Hanslowe, *supra* note 23, at 1062 (arguing that in public sector only political pressure is appropriate, and that strikes are economic pressure) *with* Alley, *supra* note 32 at 716 (discussing inappropriateness of collective bargaining in public sector).

[36] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 229 (1972)(arguing that permitting public employees to unionize gives more influence than private sector employees); Alley, *supra* note 32, at 716 (arguing that collective bargaining allows unequal input in the political process).

B. *The Weaknesses of the Traditional Arguments*

The traditional notions of sovereignty and improper delegation of authority that have been used by opponents of public sector collective bargaining are no longer acceptable as sound theory for the prohibition of public employee collective bargaining.[37] The sovereignty doctrine precludes a complete analysis of the government as employer—civil servant as employee relationship, but instead focuses only on the governmental character of the employer. Under the doctrine, once it is determined that the employer is government, it is labeled "sovereign" and given authority to make unilateral decisions and given power to fulfill legislative responsibilities free from organized employee opposition.[38] This position cannot be justified by the archaic argument that employees are under an implied duty of extra loyalty[39] or the more fundamental argument that the "king can do no wrong."[40] Governmental units are capable of improper con-

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[37] *See* Befort, *supra* note 9, at 1233 (overreaching concept of absolute governmental supremacy archaic and unworkable); Special Project, *supra* note 32, at 1021-23 (sovereignty and illegal delegation doctrines do not preclude adopting collective bargaining by public employees).

[38] Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 359-60 (1972).

[39] Imposing a ficticious duty of extra loyalty is patently unfair. *See* Befort, *supra* note 9, at 1233 (criticizing imposition of implied duty); Special Project, *supra* note 32, at 1021 (same). Perhaps civil servants should feel a slightly enhanced rush of patriotism when the national anthem is played, but government should not be able to hide behind a theory that amounts to an implied duty to remain silent.

[40] Edwards, *supra* 38, at 359-60. Harry T. Edwards, Associate Professor of Law, University of Michigan Law School, cogently stated:

> [T]he application of the strict sovereignty notion—that governmental power can never be opposed by employee organizations—is clearly a vestige from another era . . . . With the rapid growth of the government, both in sheer size as well as in terms of assuming services not traditionally associated with the 'sovereign,' government employees understandably no longer feel constrained by a notion that the 'The King can do no wrong.' The distraught cries . . . of disparate treatment merely reflect the fact that . . . public employees occupy essentially the same position vis-a-vis the employer as their private counterparts.

Id. at 360.

In *Anderson Fed'n of Teachers v. School City of Anderson*, 252 Ind. 558, 251 N.E.2d 15, 20 (1969)(DeBraler, C.J., dissenting), Chief Justice DeBraler of the Indiana Supreme Court observed that the sovereignty doctrine was not a rational argument at all but merely a technique for avoiding dealing with the merits of the issue. *Anderson*, 251 N.E.2d at 20. "The conflict of real social forces cannot be solved by the invocation of

duct.[41] In addition government's participation in negotiations is not a total abdication of authority, but instead an exercise of its authority to agree to confer with its employees on appropriate matters.[42] Even if binding arbitration is used as an impasse resolution procedure, the employees' proposals would not be automatically accepted.[43] Collective bargaining does require some change in government's position, and opponents might argue that government's sovereignty could be completely stripped away. That notion is perhaps appropriate for a pointless theoretical debate, but is not adequate to deal with the problems confronted by public employees who have been effectively silenced by such arguments. A more accurate theoretical analysis is that government as sovereign would be required to act as a responsible employer by listening to its employees in a manner meaningful to both parties. If government loses some of its sovereignty, it has also assumed a reasonable responsibility. Bargaining collectively would simply require government to assume the responsibilities of an employer and to listen to its employees' assertion of their interests. Just as in the private sector,[44] this assertion is patently ineffective if an employee can only act individually; collectiveness is essential.[45]

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magical phrases like 'sovereignty'." *Id.*

[41] *See* Pruett v. City of Rosedale, 421 So. 2d 1046, 1047 (Miss. 1982)(abolishing sovereign immunity defense Mississippi Supreme Court stated "the principle that the King [state] can do no wrong is not a legal principle that should receive a blanket application in modern times"). The *Pruett* court reasoned that the sovereignty doctrine was out of date and fostered government irresponsibility. *Id.* In abolishing sovereign immunity the court stated that the doctrine was "an historical anachronism which manifests an inefficient public policy and works injustice upon everyone concerned." *Id.* at 1050. The court only abolished the immunity of the "sovereign" where that term included the state and its local subdivisions. *Id.* at 1052. The court left intact the immunity of legislative, judicial, and executive bodies and those public officials vested with discretionary authority. *Id.*

[42] *See* Special Project, *supra* note 32, at 1021 (arguing that government has power to consult with whom it wishes).

[43] *See, e.g.*, Knight v. Minnesota Community College Faculty Ass'n, 571 F. Supp. 1, 3 (1982)(stating that under Minnesota statute negotiated agreements and arbitration awards subject to legislative review), *rev'd*, 405 U.S. 271 (1984), *see also* Or. Rev. Stat § 243.746 (1985)(listing many factors which arbitration panel must use to reach decision).

[44] *See supra* notes 6-8 and accompanying text.

[45] *See supra* notes 9-10 and accompanying text. Judge Craven writing for the federal district court in North Carolina said, "It is beyond argument that a single individual

The delegation doctrine poses a slightly more problematic argument, but is just as archaic and unacceptable as an obstacle to collective bargaining as the sovereignty doctrine. By negotiating with its employees, government would not be placing any absolute power or authority in the hands of the employees or their representatives. Employees would not be given the authority to sit for the state's representatives during legislative sessions or to move into the mayor's office. Collective bargaining would simply allow employees to meet with their employer to participate in decisions which would affect them. Obviously employees would have more input than if they were not allowed to participate at all, but they would not have excessive influence sufficient to justify a complete prohibition of their participation. Government should not be prevented from conferring with whom it wants by an argument that such conference is an improper delegation of government's authority.[46] Opponents of collective bargaining argue that bargaining is inappropriate in the political setting in which government is the employer and that it gives employees disproportionate influence in that setting.[47] The distinction between the private and public sectors as being an economic as opposed to a political environment is an insufficient distinction on which to base a prohibition of collective bargaining in the public sector. Certainly there are distinctions between the two environments, but the fact that the public sector is not a purely economic environment controlled by forces such as profits and costs does not mean that public employee bargaining is inappropriate. Analogous forces exist in the public sector. Employees would be limited by government's budget constraints. Government could not freely shift or allocate resources to benefit em-

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cannot negotiate on an equal basis with an employer . . . ." Atkins v. City of Charlotte, 296 F. Supp. 1068, 1075 (W.D.N.C. 1969). The court held that §§ 95-98 of North Carolina's General Statutes which made collective bargaining contracts void did not violate the Constitution. *Atkins*, 296 F. Supp. at 1077. But the city of Charlotte admitted that collective bargaining could be beneficial. *Id.* at 1075-76.

[46] *See* Special Project, *supra* note 32, at 1022 (arguing that traditional theory of improper delegation of authority is not valid obstacle to collective bargaining). If government has discretionary authority to make decisions concerning certain matters, then government also has the authority to allow participation in those decisions by specified groups.

[47] *See supra* notes 35-36 and accompanying text.

ployees without feeling pressure from the adversely affected beneficiaries. Moreover, government would remain subject to public opinion and the disagreement of taxpayers over any increase in taxes. While distinctions do exist between them, collective bargaining is viable in either. This viability is not destroyed by the fact that bargaining presents employees with the possibility of increasing the influence they have on government by combining political pressure[48] with that of bargaining.[49] In a study of public employee union activity in cities across the nation, Russell L. Smith reported that where bargaining was mandatory, political activity was significantly lower than where bargaining was not available.[50] From this investigation it can be concluded that employees will not seek to exert undue pressure on government by combining approaches. It appears instead that where a proper and effective means for communication is provided, political activity will simply decrease. If government is unresponsive to political pressure to begin with or if employees have no political power for whatever reason, in the absence of collective bargaining, employees are forced to strike to be heard. In states such as Mississippi where the strike is not available,[51] the needs and interests of public employees will never be dealt with adequately.[52] In addition it is arguable that public employees *should* have more influence over government than that available

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[48] The political activities most often engaged in by public employee unions are lobbying and candidate endorsements. Smith, *Public Employee Unions and Politics in American Cities*, 14 J.C.N.P.S. 1, 3-4 (1985); *see generally* Special Project, *supra* note 32, at 921-60 (discussing unions' use of lobbying and candidate endorsements).

[49] *See supra* note 32 and accompanying text (discussing common law argument that bargaining gives employees too much power).

[50] *See* Smith, *supra* note 48 at 5. Smith compared his findings to those of two earlier projects on public employee unions' political activity. In the early 1970's T.A. Hallem of U.C.L.A. completed a study which was reported in Special Project, *Collective Bargaining and Politics in Public Employment*, 19 U.C.L.A. 887 (1972). The Brookings Institution's "Studies of Unionism in Government" was completed in 1968 and analyzed by Paul Gerhart in *Political Activity at the Local Level: Threat or Promise*, International Personnel Management Association, Chicago, Illinois, 1974. In his own analysis Smith concluded that political activity has declined significantly since the Brookings and U.C.L.A. studies and that lobbying and candidate endorsements no longer dominate as the preferred activity as they did in the two earlier studies. Smith, *supra* note 48, at 6.

[51] *See infra* notes 81 and 82 and accompanying text.

[52] *See* Special Project, *supra* note 32, at 1027 (stating that where politics must be relied on and strike not available, groups with no political influence will not be heard).

through political activity. After all, government is more than a "representative" to public employees. It is an employer who should be willing to meet with its employees rather than conveniently legislating them into silence.

V. The Status of Public Sector Collective Bargaining in Mississippi

The need for and viability of collective bargaining in the public sector has been recognized by the vast majority of states.[53] Moreover, the federal government has extended collective bargaining rights to its employees.[54] In contrast to an increasing acceptance that collective bargaining can in fact be beneficial to the public interest[55] and perhaps raise employees'

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[53] Some states have enacted comprehensive statutes covering all public employees. *See, e.g.*, FLA. STAT. ANN. § 447.201-.609 (West 1981 & Supp. 1984); HAWAII REV. STAT. §§ 89.1:.20 (1976 & Supp. 1985); MASS. GEN. LAWS ANN. ch. 150E (West 1984); S.D. CODIFIED LAWS ANN. §§ 3-18-1 to -18-17 (1980 & Supp. 1983). Other states have given employees bargaining rights through more than one statute, each covering a specific group of employees. *See, e.g.*, CAL. GOV'T CODE §§ 3500-3510 (West 1980 & Supp. 1984)(municipal employees); *id.* §§ 3540-3549 (school employees); *id.* §§ 3560-3599 (higher education employees); *id.* §§ 3525-3536 (civil service employees); *id.* §§ 3625-3536 (other state employees). Still other states only grant bargaining right to specific groups of employees. *See, e.g.*, ALA. CODE § 11-43-143 (1977)(firefighters); TENN. CODE ANN. §§ 49-5-611 (1983)(teachers); TEXAS REV. CIV. STAT. ANN. art. 5154C-I (Vernon 1971 & Supp. 1982)(firefighters and police); WYO. STAT. § 27-10-104 (1983)(firefighters).

[54] In 1962 President Kennedy issued Executive Order 10988 which created the initial framework for public employee collective bargaining and initiated the move away from unilateral management action in federal government. *See* M. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE 3 (1976);D. SULLIVAN, PUBLIC EMPLOYEES LABOR LAW 2 (1969). Subsequent executive orders issued by President Nixon and President Ford solidified and maintained the principles of collective bargaining which had been created in the original executive order. *See* NESBIT, *supra*, at 133. During President Carter's administration the Executive Order program underwent structural and substantive developments. Reorganizational Plan No. 2 created a neutral third party, the Federal Labor Relations Authority (FLRA), as the authority in deciding unfair labor practice cases and conducting hearings and replaced the Federal Labor Relations Council (FLRC) which had been controlled by management. Reorg. Plan No. 2 of 1978, 5 C.F.R. 2420 (1980), *reprinted in* 5 U.S.C. § 1101 app. at 452-460 (1982); *see* Podell, *An Emerging Doctrine: Unfair Labor Practices in the Federal Sector*, 36 AD. L. REV. 433, 433-35 (1985)(discussing differences between FLRC and FLRA). Following the Reorganizational Plan, the Civil Service Reform Act of 1978 was passed and recognized the rights of employees to bargain collectively. 5 U.S.C. §§ 701-7135 (1982).

[55] *See* 5 U.S.C. § 7101(a)(1)(1982)(stating that collective bargaining is in public's interest).

morale and productivity, Mississippi's legislature has resisted collective bargaining. During Mississippi's legislative sessions from 1971 through 1983, five bills were introduced in senate committees,[56] and from 1973 through 1984 five bills were introduced in house committees[57] which would have created in varying degrees collective bargaining procedures for public employees or specified groups of such employees. None of the bills or segments thereof providing for collective bargaining were passed, and in fact none of the ten bills made it out of committee considerations.

Although there is no statutory provision for collective bargaining, negotiations do occur, most notably between organized city employees[58] and municipalities.[59] This collective bargaining

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[56] *See* S.B. No. 2704 Miss. Leg. Reg. Sess. (1983)(proposing to create Mississippi Public Employee Relations Board and procedures for bargaining); S.B. No. 2379, Miss. Leg. Reg. Sess. (1983)(proposing to create Professional Employee Relations Committee and procedures for bargaining between teacher organizations and boards of education); S.B. No. 2326, Miss. Leg. Reg. Sess. (1982)(proposing to create Professional Employee Relations Commission and procedures for bargaining between teacher organizations and boards of education); S.B. No. 1637, Miss. Leg. Reg. Sess. (1973)(proposing to provide for collective bargaining between municipalities and employees of transportation systems acquired by such city); S.B. No. 2152 Miss. Leg. Reg. Sess. (1971)(proposing to provide for collective bargaining between fire fighters and respective governmental authorities or units).

[57] *See* H. B. No. 911, Miss. Leg. Reg. Sess. (1984)(proposing to create Professional Employee Relations Board and procedures for collective bargaining); H.B. No. 552, Miss. Leg. Reg. Sess. (1982)(proposing to create Professional Employee Relations Commission and procedures for bargaining with teacher organizations); H.B. No. 1108, Miss. Leg. Reg. Sess. (1981)(proposing to create Public Employee Relations Board and procedures for collective bargaining); H.B. No. 225, Miss. Leg. Reg. Sess. (1973)(proposing to provide for collective bargaining between fire fighters and respective governmental units and to require that wages and conditions be comparable to private sector employees).

[58] According to information published in 1984 by the Mississippi Manufacturers Association, unions represent city employees in the following municipalities: Bay St. Louis, Biloxi, Clarksdale, Clinton, Columbus, Corinth, Greenville, Gulfport, Hattiesburg, Jackson, Laurel, Liberty, Meridian, Moss Point, Natchez, Pascagoula, Picayune, Taylorsville, Tupelo, and Vicksburg. Mississippi's Mfrs. Ass'n, Directory of Labor Unions in Mississippi, (1984). In a more extensive investigation focusing only on public employee organizations, it was reported that city workers were represented in the additional cities of Byhalia, Greenwood, Leland, McComb, Ocean Springs, Oxford, West Point, and Yazoo City. Mississippi Economic Council, Public Employee Unions Special Committee, An Update: Public Employee Unions—Visible and Vocal in Mississippi, 17-20 (1981).

[59] Unions have been active in negotiating with city governments in Mississippi. *See, e.g.*, Local 52, Intern'l Ass'n of Firefighters v. City of Meridian, No. 6621 (Chancery Ct., Lauderdale County, Dec. 4, 1981)(involving collective agreement between IAF and City

is not prohibited in Mississippi,[60] and government apparently is free under its own discretion to negotiate with unions as a means of facilitating meaningful communication with its employees.[61] However, the validity of any agreement or contract that is entered into is another matter.

A. The Ultra Vires Doctrine

Before public employee collective bargaining contracts appeared, the Mississippi judiciary developed the *ultra vires* doctrine under which contracts with municipalities were often invalidated. In *Edwards Hotel & City Railroad Co. v. Jackson*[62], decided by the Mississippi Supreme Court in 1910, it was held that a city ordinance which released a street railroad company

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of Meridian); *cf.* Morris, *Everything You Always Wanted to Know About Public Employee Bargaining in Texas — But Were Afraid to Ask*, 13 HOUSTON L. REV. 291, 303 (1976)(discussing collective bargaining and negotiating even in face of prohibition). In two cases the Mississippi Supreme Court has referred to a professional teacher's association representing Hazelhurst teachers as the certified or designated collective bargaining agent for teachers in the city's school district. Tanner v. Hazlehurst Mun. Separate School Dist., 427 So. 2d 977, 978 (Miss. 1983); Jackson v. Hazlehurst Mun. Separate School Dist., 427 So. 2d 134, 137 (Miss. 1983).

[60] Mississippi law does not prohibit public employee collective bargaining. Although the validity of the agreements reached may be debated, there is no statute, constitutional provision, or Mississippi court decision which says collective bargaining is prohibited. The Mississippi right-to-work law does not prohibit collective bargaining. The NLRA § 8(a)(3) provided that employers could not discriminate in employment on the basis of membership or nonmembership in a union. 28 U.S.B. No.C. § 158(a)(3) (1982). A proviso to the rule created an exception by providing that agreements between an employer and a union that employment was conditional on membership or nonmembership was permissible. *Id.* However, NLRA § 14(b) made the operation of the proviso subject to a local option. 28 U.S.B. No.C. § 165(b) (1982). Mississippi exercised the option by enacting a right-to-work statute. MISS. CODE ANN. § 71-7-47 (1972). The statute was later added to the state constitution by amendment. MISS. CONST. art 7, § 198-A. The Mississippi right-to-work law was passed to give workers the freedom of choice as to union membership or nonmembership, and not to prohibit collective bargaining in any way. Hattiesburg Bldg. & Trade Council v. Broome, 247 Miss. 458, 493, 153 So. 2d 695, 710 (Miss. 1963), *rev'd on other grounds*, 377 U.S.B. No. 126 (1964); *cf.* Hattiesburg Building and Trade Council v. Mississippi Mech. Contractors, Inc., 207 So. 2d 99 (Miss. 1968)(holding that contract for union scale not violative of right-to-work statute).

[61] *See* Letter from A.F. Summer, Attorney General for Miss., to Marvin Williams, Attorney for the City of Meridian, and enclosure (Aug. 10, 1973) (copy on file in Miss. L. J. Office)(stating that absent prohibition or mandate, negotiating is left to discretion of city).

[62] 96 Miss. 547, 51 So. 802 (1910).

from the responsibility and the expense of paving the street adjacent to its property was unenforceable.[63] Several years after the exempting ordinance had been passed, the city sought to force the company to bear the expense of paving.[64] In rejecting the company's assertion of estoppel, the court said that the city's powers and rights were defined by the city's charter, granted by the state by statute[65] which gave the city full jurisdiction in the matters of street maintenance.[66] This authority belonged to the city, the court reasoned, and not to the city officials.[67] Therefore, the court concluded that if one set of officials could bind the city, then the right of the city to exercise full jurisdiction would be limited.[68] Since the state had not given the officials the power to bind the city, or subsequent officials, the ordinance in question exceeded the power conferred on the municipality by law and was *ultra vires* and void.[69] The *ultra vires* doctrine was adopted in later cases,[70] and the principles of the doctrine were controlling in the context of a public sector collective bargaining contract in *Local 52, International Association*

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[63] *Id.* at 805. The railroad company alleged that the city had agreed to exempt the company for 10 years from the operation of an ordinance passed in 1902 in which the mayor and the board of alderman declared that affected property owners should bear the costs of paving. *Id.*

[64] *Id.* at 804.

[65] *Id.* In 1892 the city abandoned its special charter and came under a general statutory charter which prescribed the powers, duties, and rights of all cities operating thereunder. *Id.*

[66] *Id.* at 804.

[67] *Id.* at 805.

[68] *Id.*

[69] *Id.* The Mississippi Supreme Court has indicated that municipalities possess those powers that are granted by statute and that are reasonably or necessarily implied from such grant and that are reasonably necessary to give effect to the powers granted. *See* City of Jackson v. McMurry, 288 So. 2d 23, 25 (Miss. 1974)(discussing sources of municipal authority and finding ordinance within authority).

[70] *See* Smith v. Mitchell, 190 Miss. 819, 824, 1 So. 2d 765, 766-67 (1941)(holding that contract with accountant was void); Fitzgerald v. Town of Magnolia, 183 Miss. 334, 184 So. 59, 60 (1938)(holding that contract with tax assessor was void); Tulos v. Town of Magee, 181 Miss. 288, 295-96, 179 So. 557, 558 (1938)(holding that contract with city for provision of water was void). However, while a city counsel cannot be bound by its predecessors, a city counsel cannot violate a controlling ordinance passed by its predecessors by simple resolution or ruling. The ordinance must be repealed and a new ordinance properly passed. Kynerd v. City of Meridian, 366 So. 2d 1088, 1088 (Miss. 1979).

of Firefighters v. City of Meridian.[71] In *Local 52* the IAF sought to have a collective bargaining agreement enforced by the chancery court. Honorable William Neville, Chancellor, ruled that the agreement was void. The Chancellor reasoned that the city had only that authority which was given it by the legislature. Since no law of Mississippi granted the city the authority to engage in collective bargaining, then the city had exceeded its authority and the agreement was not enforceable.[72] The *ultra vires* doctrine seems irrational in view of the fact that municipalities routinely enter into contracts with businesses and private enterprises today and certainly cannot escape contractual obligations by conveniently passing a new ordinance or claiming that they cannot be bound by a previous administration. Nonetheless the doctrine exists and is perhaps an expression of the belief that public employee collective bargaining with municipalities should not be enforced by the judiciary absent legislative approval.[73]

B. The Public Employee Anti-Strike Statute

With no provision for collective bargaining and with the validity of any bilateral agreement in question, public employees in Mississippi are in an unacceptable position. That position was worsened in May of 1985 when a statute prohibiting strikes by public employees became effective.[74] The statute was passed in response to a teacher strike which began in February of 1985 and affected 57 districts.[75]

The strike occurred while the Mississippi Legislature was in session and was intended to compel the legislature to consider possible teacher salary raises.[76] At that time Mississippi teachers were the lowest paid in the entire nation.[77] Certainly the teach-

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[71] No. 6621 (Chancery Ct., Lauderdale County, Dec. 4, 1981).

[72] *Id.*

[73] International Ass'n of Firefighters Local Union 1472 v. City of Gulfport, Civ. No. 72-S-167 at 3 (S.B. No.D. Miss., May 8, 1973); *see* Atkins v. City of Charlotte, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969)(holding that statute invalidating collective bargaining agreements was constitutional).

[74] *See* MISS. CODE ANN. §§ 37-9-75 and 25-1-105 (Supp. 1985)(prohibiting strikes by teachers and other public employees "as far as is practicable").

[75] The Clarion-Ledger, March 18, 1986, at 1A, col. 2.

[76] The Clarion-Ledger, March 15, 1985, at A1, col. 1.

[77] The Clarion-Ledger, March 18, 1985, at A12, col. 3.

ers had an issue that they needed to bring to their employer, but doing so individually would have been ineffective.[78] Collective action was needed, and collective action was taken by some 9,000 teachers who participated in the work stoppage.[79] The legislature eventually granted pay raises, but also responded to the strike by enacting a harsh anti-strike statute.[80] The statute was actually in two sections—the teacher anti-strike provision[81] and a provision making the anti-strike section applicable to all public employees who are employed by governmental entities and are paid in whole or in part by state funds.[82] The anti-strike provisions of the statute were shockingly vindictive and appeared to embody the traditional sovereignty theories.[83] Under the statute public employees were prohibited from promoting, encouraging or participating in any strike against the state or its agencies.[84] In essence the statute required complete loyalty to the state in job performance.

Pursuant to the statute, the duty of loyalty would be breached by merely promoting or encouraging the "withholding, in whole or in part, of the full, faithful and proper performance of the duties of employment."[85] Although a proviso indicated that an employee's right to communicate a complaint or an opinion was not being impaired,[86] the statute still prohibited such expression or communication if it interfered with the employee's commitment to the state.[87] The statute possibly vio-

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[78] *See supra* notes 6-10 and accompanying text (discussing labor's need for collectivism).

[79] The Clarion-Ledger, Feb. 24, 1985, at A1, col. 2.

[80] *Id.*

[81] MISS. CODE ANN. § 37-9-103 (Supp. 1986).

[82] MISS. CODE ANN. § 25-1-105 (Supp. 1986).

[83] *See supra* notes 15-26 and accompanying text (discussing traditional theories).

[84] MISS. CODE ANN. § 37-9-75(3) (Supp. 1986).

[85] MISS. CODE ANN. § 37-9-75(1) (Supp. 1986). This burden of loyalty was created by the operation of two subsections of § 37-9-785. Subsection (1)(a) defined the term "strike" to include the withholding of even a part of the full, faithful and proper performance of employment duties. MISS. CODE ANN. § 37-9-75(a)(1) (Supp. 1986). Subsection (3) prohibited employees from simply promoting or encouraging a strike. MISS. CODE ANN. § 37-9-75(3) (Supp. 1986). Read together these two subsections created a heavy implied duty of loyalty.

[86] MISS. CODE ANN. § 37-9-75(1)(a) (Supp. 1986).

[87] MISS. CODE ANN. § 37-9-75(1)(a); (3) (Supp. 1986).

lated the first amendment right of free speech, an issue not addressed in this article.

The penalties for violation of the statute were harsh. Members of local school boards and school administrative personnel as well as all other government administrative personnel and employees were made subject to possible criminal charges and fines.[88] The statute provided for mandatory injunctive action[89] and contempt proceedings for violation of such injunctions.[90] Unions found to be in contempt of court for violating an injunction issued pursuant to the statute were made subject to heavy fines,[91] and officials of such unions were made personally liable for any damages suffered by a public employer as a result of the violation.[92] Employees who violated the statute were made subject to mandatory and permanent employment termination.[93]

Teachers who participated in the strike in Mississippi were seeking to communicate with their employer concerning a legitimate interest. The strike was not pleasant for the participants, but there was no other alternative available for collective action.[94] The anti-strike statute now prohibits work disruptions and may protect the general public from the immediate inconvenience and harm that can be caused by strikes; however, the statute has taken away from the state's employees their only

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[88] MISS. CODE ANN. § 37-9-75(4) (Supp. 1986). Government administrators who violated the statute were guilty of a misdemeanor and subject to a fine of between $100.00 and $250.00 for each day such violation continued. *Id.*

[89] MISS. CODE ANN. § 37-9-75(6) (Supp. 1986). Subsection (5) granted chancery courts the jurisdiction to enjoin violations of the statute. MISS. CODE ANN. § 37-9-85(5) (Supp. 1986). Subjection (6) required school districts to file suit for an injunction if that district's employees were involved in or would be affected by the strike. MISS. CODE ANN. § 37-9-785(6) (Sup. 1986).

[90] MISS. CODE ANN. § 37-9-75(7) (Supp. 1986).

[91] MISS. CODE ANN. § 37-9-75(7) (Supp. 1986). Employee organizations found to be in contempt of court for violating an injunction were made subject to a fine of up to $20,000.00 for each day the injunction was violated. *Id.*

[92] *Id.*

[93] MISS. CODE ANN. § 37-9-75(8) (Supp. 1986). A state employee who was terminated pursuant to the statute could not be reemployed by state government unless the court first found a public necessity for such employment. *Id.*

[94] A second grade teacher from Harrison County told the Clarion-Ledger: "I'll vote to strike, but I don't want to do it. I have to." In moving from New Mexico to Mississippi, the teacher took a $2,000 pay cut. The Clarion-Ledger, Feb. 24, 1985, at A15, col. 1.

means of effective communication with their employer. The Mississippi statute is not innovative, but is very similar to no-strike clauses in Florida's statutes.[95] There is one fundamental difference between the two states. Florida's no-strike provisions are only a part of a comprehensive collective bargaining act that also provides for meaningful negotiations between the state's employees and government.[96] Under the Florida system employees have a way of asserting their interests and communicating with their employer without resorting to the strike.

VI. Conclusion

In order for employees to effectively communicate or negotiate with management, employees must be able to approach their employer collectively.[97] In Mississippi no statutory procedure exists whereby public employees and government may come together to discuss employment problems and conditions. The anti-strike statute which was passed after the recent teacher strike places Mississippi's public employees in an unacceptable position absent some alternative means of effective collective communication. Mississippi should consider a statutory system of collective bargaining by which public employees could meet with their government employers for the purpose of meaningful discussions. Several bills that would have provided for public sector collective bargaining have come before legislature committees in the past.[98] The substance of these bills should be reconsidered and a collective bargaining statute enacted which would facilitate collective communication without the need for strikes.[99]

Richard Compere

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[95] *Compare* Fla. Stat. Ann. §§ 447.,505-.507 (West 1981)(prohibiting strikes by public employees and providing penalties for violations) *with* Miss. Code Ann. §§ 25-1-105 and 37-9-75 (Supp. 1986)(prohibition of strikes and sanctions for violation).

[96] Fla. Stat. Ann. § 447.201-.609 (West 1981 and Supp. 1984).

[97] *See supra* notes 6-10 and accompanying text (discussing employees' need for collectiveness).

[98] *See supra* note 56 and 57 (listing collective bargaining bills that were introduced in Mississippi legislative committees).

[99] *See* Anderson, *supra* note 23, at 964 (discussing success of collective bargaining in the absence of strikes).

RECENT DECISIONS

Constitutional Law—First Amendment—Cities May Restrict Location of Adult Theaters Through Narrowly Tailored, Content-Neutral, Time, Place and Manner Restrictions

Plaintiffs[1] brought a civil action in the United States District Court for the Western District of Washington alleging that a zoning ordinance,[2] enacted by the defendant-city,[3] violated the first and fourteenth amendments of the United States Constitution.[4] Plaintiffs initiated the action after discovering that the

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[1] Plaintiffs were Playtime Theatres, Inc. and Sea-First Properties, Inc. City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925, 926 (1986).

[2] *Id.* at 927. The ordinance restricted "any 'adult motion picture theater' from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school." *Id.*

[3] The defendant was the City of Renton, Washington. *Id.* at 926-27.

[4] *Id.* at 926. Cities and states may not abridge the first amendment guarantee of free speech without violating the due process clause of the fourteenth amendment. *See, e.g.*, Lovell v. City of Griffin, 303 U.S. 444, 450 (1938)(city ordinance prohibited distribution of literature without obtaining permission of city official, who had sole discretion in matter, held first and fourteenth amendment violation); Stromberg v. California, 283 U.S. 359, 368 (1931)(state red flag law infringed on free speech); *see generally*, Lewis & Trichter, *The Nationalization of the Bill of Rights: History, Development and Current Status*, 20 Washburn L.J. 195, 201-40 (1981)(traces application of Bill of Rights including first amendment to states vis-a-vis fourteenth amendment). Plaintiffs also contended that the vagueness of the statute denied them due process of law. *Renton*, 106 S. Ct. at 931, 933 n.4. In order to avoid being found unconstitutionally vague, a statute must have given both actual notice to an individual that certain conduct was proscribed and established clear guidelines for those who enforce the statute. *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 574-76 (1974)(flag contempt statute's wording held void for vagueness); Papachristou v. City of Jacksonville, 405 U.S. 156, 161-62 (1972)(city vagrancy law based on old English law which made criminal several activities considered innocent by modern standards held void due to vagueness); *see generally* Note, *Big Mama Rag: An Inquiry*

display of constitutionally protected, sexually explicit films at their two recently purchased theaters was prohibited by a city zoning law.[5] This ordinance made it unlawful to operate an adult theater[6] within a certain distance of specific land uses such as schools, churches, and residential areas.[7] The federal district

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into Vagueness, 67 VA. L. REV. 1543, 1548-59 (1981)(discussion of traditional function of vagueness challenges). Further, plaintiffs contended that the classification scheme used by the ordinance which differentiated between adult and non-adult theaters denied them equal protection of the laws. *Renton*, 106 S. Ct. at 931, 933 n.4. The equal protection clause commands that all individuals in similar circumstances be treated in a similar manner under the laws of state and local government. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971)(violation of equal protection clause to allow only men to be administrators of estates when both men and women are similarly situated). Equal protection claims are often "intertwined" with first amendment claims and statutory classifications affecting protected speech are subject to careful scrutiny. *E.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-102 (1972)(classification scheme differentiating between labor and non-labor picketing subjected to close scrutiny and ruled unconstitutional). When a classification scheme effects first amendment interests the equal protection clause requires that the statute creating the scheme be narrowly tailored and the classification itself be necessary for an overriding state interest. *See Mosley* at 94-101 (crucial question was whether appropriate governmental interest was suitably furthered by classification).

[5] *Id.* at 927.

[6] *Id.* The ordinance defined an adult theater as any "enclosed building used for presenting motion picture films, video cassettes, cable television, or any other visual media, distinguished or characteri[zed] by an emphasis or matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein." *Id.* The specified acts outlined by the ordinance included: sexually aroused human genitals, masturbation, intercourse or sodomy and fondling or other erotic touching of various parts of the human body. City of Renton v. Playtime Theatres, Inc., 748 F.2d 527, 529 n.1 (1984), *rev'd*, 106 S. Ct. 925 (1986). The specified areas the statute set out included various body parts "less than completely and opaquely covered . . ." and "human male genitals in a discernible turgid state . . ." covered or not. *Id.*

[7] *Renton*, 106 S. Ct. at 926. The ordinance prohibited the location of an adult motion picture theater within 1,000 feet of any residential zones, single-family units, multi-family units, churches, parks or schools. *Id. The ordinance was enacted prior to the establishment of any adult theaters inside the city. Id.* at 927 (emphasis added). The record before the United States Supreme Court contained no evidence that at the time the ordinance was adopted any other adult businesses were located in or anticipating a move to Renton, Washington. *Id.* at 931. Although the city had no actual experience with adult theaters, the city Planning and Development Committee conducted public hearings on the possibility of the city enacting a zoning ordinance which dealt with adult entertainment. *Id.* at 927. Furthermore, this committee investigated the experiences of Seattle and other cities as to the harmful secondary effects of adult theaters on urban areas. *Id.* The city council reviewed the opinion of the Supreme Court of Washington in Northend Cinema, Inc. v. Seattle, 585 P.2d 1153 (Wash. 1978), which lauded the extensive findings of experts regarding the ill-effects of adult theaters on neighborhoods. *Renton*, 106 S. Ct. at 930-31. A statement of reasons was added to the zoning ordinance

court denied the declaratory and injunctive relief sought by the plaintiffs.[8] The United States Court of Appeals for the Ninth Circuit reversed.[9] On writ of certiorari, the United States Supreme Court, *held*, reversed.[10] Where a city, predominantly concerned with the ill effects of adult theaters on a comunity, enacts a narrowly tailored content-neutral time, place, and manner zoning ordinance designed to further a substantial government

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while suit was pending in federal district court. *Id.* at 927. The United States Court of Appeals for the Ninth Circuit reproduced the quite lengthy statement as part of its opinion. *Renton*, 748 F.2d at 530. n.3, *rev'd*, 106 S. Ct. 925 (1986). The statement of reasons contained goals for the ordinance; the prevention of crimes such as incest, protection of the city's merchants, and the preservation of the city's image and property values. *Id.*

[8] *Renton*, 106 S. Ct. at 926. Prior to this denial, the suit was referred to a federal magistrate who recommended that a preliminary injunction be granted against enforcement of the ordinance. *Id.* at 927. The magistrate's recommendation was based on his finding that only 200 acres were open for adult theater use and since the land was unsuitable for that use, then the ordinance was in effect a total ban on adult theaters. *Renton*, 748 F.2d at 531-32, *rev'd*, 106 S. Ct. 925 (1986). The district court adopted the magistrate's recommendation and the plaintiffs began showing sexually explicit films at the theaters. *Renton*, 106 S. Ct. at 927. Later the district court vacated this order, based on the findings that 520 acres or five percent of Renton was available for adult theater use, and thereafter refused to grant any permanent injunctions against enforcement of the ordinance. *Id.* at 932. Further, the district court found the ordinance was unrelated to the suppression of speech and did not substantially impair any first amendment interest since the city's predominant concerns were not with the content of adult films, but rather with the secondary effects of the adult theaters on communities. *Id.* at 929. In addition, the district court ruled that Renton was not required to show actual adverse impact on itself but could rely on the evidence of other cities. *Id.* at 931. Finally, the district court found the impairment of speech was no greater than that needed to further the government's interest. *Id.* at 928. The district court based its decision upon the underlying rationale of the Supreme Court's decisions of Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) and United States v. O'Brien, 391 U.S. 367 (1968). *Renton*, 106 S. Ct. at 928.

[9] *Renton*, 106 S. Ct. at 928. The court of appeals found that the 520 acres available for use by adult theaters was not, in reality, available and as such the ordinance acted as a substantial restriction on the plaintiffs' first amendment interests. *Id.* at 932. The court found that a large portion of this land was already occupied by a sewage disposal site and treatment facility, a race track, an industrial park, warehouses, manufacturing facilities, an oil tank farm and a fully developed shopping center. *Renton*, 748 F.2d at 534. The court of appeals found that Renton failed to show a substantial governmental interest and also failed to prove it was not motivated by a desire to restrict the plaintiffs' speech because of a dislike for the speech's content. *Renton*, 106 S. Ct. at 928. The court of appeals, like the federal district court, based its opinion on United States v. O'Brien, 391 U.S. 367 (1968), and subsequently remanded the case to the lower court. *Renton*, 106 S. Ct. at 928.

[10] *Renton*, 106 S. Ct. at 927 n.1.

interest while not unreasonably restricting alternative avenues of communication, the ordinance is not a violation of the first amendment but is a valid exercise of the city's zoning authority. *City of Renton v. Playtime Theaters, Inc.*, 106 S.Ct. 925 (1986).

In 1925 the United States Supreme Court first asserted that the rights of free expression, secured against congressional encroachment by the first amendment, were also safeguarded from state action under the concept of liberty, which was protected by the due process clause of the fourteenth amendment.[11] Not long thereafter, the Court upheld a city's right to use its police power comprehensively to regulate land use.[12] Traditionally, a city's ex-

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[11] *See* Gitlow v. New York, 268 U.S. 652, 666 (1925)(Court assumed freedom of speech was fundamental liberty protected by due process clause). In *Gitlow*, the United States Supreme Court considered the relationship between the exercise of a state's police power and the rights of individuals to free expression. *Gitlow*, 268 U.S. at 667-69. In *Gitlow*, a defendant was convicted under state law making it a crime to advocate, advise, or teach the overthrow of organized government by force or violence. *Id.* at 654. While the Court assumed that free speech was protected by the due process clause from state action, it upheld the law as a proper exercise of the state's police power. *Id.* at 667-69. In addition, the Court pointed out that exercises of police power by states were unconstitutional only if the law was arbitrary or unreasonable. *Id.* at 668-70. The Court gave great deference to the state legislature in deciding what situations constituted clear and present dangers and what laws were required for the public welfare. *Id.* at 668. In 1952, first amendment freedoms were extended to motion pictures. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). However, the Court in *Burstyn* pointed out that it was not granting carte blanche to "exhibit every motion picture of every kind at all times and all places." *Id.; see also*, Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 302-3 (1984)(short history of free speech in America after 1919). *Compare* Gitlow v. New York, 268 U.S. 652, 668 (1925)(states may exercise police power as long as not arbitrary or unreasonable) *with* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978)(later Court not as deferential to legislative decision when first amendment involved).

[12] Euclid v. Ambler Realty Co., 272 U.S. 365, 390-97 (1926). In *Euclid*, the Court dealt with due process and equal protection challenges to a comprehensive zoning ordinance. *Id.* at 384. The Court stated that comprehensive zoning plans would be upheld as proper exercises of police power by cities so long as the laws were not arbitrary or unreasonable and bore a substantial relationship to the public health, safety, morals, or general welfare. *Id.* at 395. Today, in zoning cases that do not touch on first amendment issues, the Court still requires that an ordinance substantially advance a legitimate state interest in order to be reasonable. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)(city zoning law which prevented building of multi-family units held to have pursued legitimate state interest of protecting residents from ill-effects of urbanization). The Court has on occasion reviewed zoning laws under constitutional theories such as equal protection and substantive due process. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 499-506 (1977)(zoning ordinance violated non-economic substantive due

ercise of its police power, especially in the form of zoning laws, did not give rise to first amendment issues.[13] However, since the rights secured by the first amendment had a potential effect on other individuals, it was necessary that cities be allowed to regulate the exercise of these rights.[14] Historically, cities through their police power have been able to regulate the time at which speech occurred, the manner of its delivery, and the place at which it occurred.[15] However, cities have not been permitted to favor one type of speech over another based solely on the speech's content.[16] In addition, city ordinances that restricted

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process); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 263-66 (1977)(equal protection case which required proof of discriminatory purpose.)

[13] *E.g.*, Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)(zoning ordinance prohibiting certain development challenged under fifth and fourteenth amendments); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)(state law preventing coal mining which would cause house to sink constituted a taking of property). *See generally* Pearlman, *Zoning and the First Amendment*, 16 URB. LAW 217 (1984)(traditional zoning questions usually involve reasonableness of ordinances and taking clause issues).

[14] *See* Kovacs v. Cooper, 336 U.S. 77, 81-85 (1949)(upheld city law which forbade use of loudspeakers on public streets); Cox v. New Hampshire, 312 U.S. 569, 574 (1941)(upheld state law which required that parade permits be obtained prior to march). In *Cox*, the United States Supreme Court stated that the civil liberties guaranteed by the Constitution "imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Id.* at 574. *See generally* Carrafiello, *Weighing the First Amendment on the Scales of the Balancing Test: The Choice of Safety Before Liberty*, 8 S.U.L. REV. 255, 256, 299-300 (1982)(discussion of court's analysis in reconciling individual's right to liberty with the need of government to maintain security, stability, and order).

[15] *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972)(black demonstrator arrested under unconstitutional anti-picketing ordinance); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941)(city used reasonable time, place, and manner restrictions to insure control of streets and public convenience); *accord* Kovacs v. Cooper, 336 U.S. 77, 85-86 (1949)(city ordinance prohibited use of loudspeakers on streets); *see also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, Ch. 18, § XIII, at 977-88 (2d ed. 1983)(general discussion of time, place, and manner restrictions on speech).

[16] *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972)(city ordinance which prohibited all picketing next to schools except peaceful labor picketing held unconstitutional); Street v. New York, 394 U.S. 576, 586-87 (1969)(conviction based on words spoken during burning flag held unconstitutional); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953)(held ordinance which prohibited speeches in city park unconstitutional when applied to convict Jehovah's Witness speaker but allowed other formal religious sermons). In *Mosley*, the Court stated "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-13, at 584-88 (1978)(scholarly analysis distinguishing content-based laws from content-neutral laws).

speech were required to be narrowly tailored to further a substantial governmental interest in order to survive constitutional inquiry.[17]

In the early 1970s, the United States Supreme Court recognized that a state's interest in barring material not protected by the Constitution[18] extended to such areas as protecting a community's qualify of life, its environment, and maintaining the public safety.[19] Thus in *Paris Adult Theatre I. v. Slanton*,[20] the Court allowed a state to rely on those interests to justify the prohibition of an individual's use of his property for the commercial display of obscene material for consenting adults.[21] The state based its decision to enact the law partly on the "unprovable assumption" that a link existed between the display of obscene material and crime.[22] In deference to this legislative deci-

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[17] *See* Grayned v. City of Rockford, 408 U.S. 104, 115-17 (1972)(anti-noise ordinance upheld as not overly broad and furthering state's interest in maintaining quiet around schools); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 101 (1972)(fourteenth amendment requires that law affecting free speech be narrowly tailored to advance legitimate objectives); Shelton v. Tucker, 364 U.S. 479, 488 (1960)(law which required disclosure of every associational membership held too broad for accomplishing government's legitimate purpose of teacher competence).

[18] *See* Miller v. California, 413 U.S. 15, 25-26 (1973)(modern test defining limits of anti-obscenity laws set forth); *see also* Riggs, *Miller v. California Revisited: An Empirical Note*, 1981 B.Y.U.L. REV. 247, 247-73 (1981)(traces *Miller*'s effect on obscenity law since 1973 in light of Justice Brennan's predictions that no workable standard existed). In 1969, the United States Supreme Court upheld the right of an individual to possess obscene material in the privacy of his home. Stanley v. Georgia, 394 U.S. 557, 568 (1969). In *Stanley*, the Court rejected the state's contention that its interests encompassed the protection of the individual's mind and prevention of crime caused by viewing obscene material. *Stanley*, 394 U.S. at 565-66. The former interest was rejected as state mind control; the latter on the grounds that the state lacked clear evidence of a link between the obscene material and crime. *Id.*

[19] Paris Adult Theater I v. Slaton, 413 U.S. 49, 58 (1973). In *Paris*, the theater's exterior appeared conventional and nonoffensive, it displayed no outside photographs and warned onlookers as to the content of the films it exhibited. *Id.*

[20] 413 U.S. 49 (1973).

[21] *Id.* at 58-60. The State of Georgia prohibited the public exhibition of obscene films. *Id.* at 51. The state attorney filed a civil complaint to enjoin the Paris Adult Theatre from displaying two obscene films to the public for a paid admission. *Id.* The Georgia Supreme Court determined that the films were without protection under the first amendment and, thus, enjoined their exhibition. *Id.* at 53.

[22] *Id.* at 60-62. The United States Supreme Court found that although there was no scientific proof that exposure to obscene films adversely affected society, the Georgia Legislature could have reasonably determined that the nexus existed. *Id.* at 60-61.

sion, the Court stated that it would resolve empirical uncertainties only when those uncertainties served as the basis for legislation which infringed upon constitutional rights.[23] In 1975 *Erznoznik v. City of Jacksonville*[24] presented the Court with an opportunity to review a city's purported interest in enacting a law which impacted on protected speech.[25] In *Erznoznik*, a city had adopted a nuisance ordinance which prohibited drive-in theatres, whose screens were visible from a street or public area, from using their screens to exhibit films which contained nudity.[26] The state courts upheld the law as a valid use of the city's police power[27]; on review, the Court held that the law violated the first amendment since it amounted to governmental censorship based on the content of speech.[28] The city was unable to convince the Court that such censorship was justified by the city's interest in the protection of its young people, the regulation of traffic, and the protection of the limited privacy interest of the passersby.[29] However, and more impor-

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[23] *Id.* at 60. The Court concluded that the fact that a legislative decision reflected an unproveable assumption was insufficient to declare the statute unconstitutional. *Id.* at 62; *cf. Stanley*, 394 U.S. at 565-66 (need of clear evidence linking crime to obscene material when material confined to privacy of one's home).

[24] 422 U.S. 205 (1975)

[25] *Id.* at 208, 212, 214. The city primarily argued that it had a substantial interest in the protection of its citizens from an unwilling exposure to nudity. *Id.* at 208. The Supreme Court acknowledged that while a city may protect an individual's privacy by adopting reasonable, content-neutral, time, place, and manner restrictions, a city's ability to act as a censor based on content was severly limited. *Id.* at 209.

[26] *Id.* at 206-07. A theater manager was charged with the violation of this law because he exhibited a movie which contained the buttocks and bare breasts of a female on a drive-in theater screen visible from public streets. *Id.* at 206. In argument before the United States Supreme Court, the city conceded that its law banned movies which were protected by the Constitution under the standards set out in *Miller v. California*. *Id.* at 208. The city maintained that such a ban should have been allowed under the theory that any movie which contained nudity which was visible from a public place could be suppressed as a public nuisance. *Id.*

[27] *Erznozik*, 422 U.S. at 207.

[28] *Id.* at 212.

[29] *Id.* at 212, 214-15. The Court rejected the city's interest in preserving the privacy of passersby on the ground that the passerby could have averted his eyes. *Id.* at 212. While the Court spurned the city's theory that the ordinance protected young people from exposure to nudity, the Court noted that minors have first amendment rights to give and receive information, and the ordinance was overly broad in constricting the range of speech available to minors. *Id.* at 212-15. The city attempted to strengthen its argument when it stated that the ordinance also helped regulate traffic, but the Court

tantly, the Court suggested that a zoning ordinance which restricted the location of drive-in theaters would be upheld if the ordinance was designed to further a more substantial state interest.[30] Subsequently, in *Young v. American Mini Theatres, Inc.*[31] a plurality of the United States Supreme Court upheld a Detroit zoning ordinance which regulated the location of theaters that displayed constitutionally protected, sexually explicit films.[32] The ordinance effectively dispersed adult theaters throughout the city.[33] The city council determined that a concentration of adult theaters and certain other businesses had a tendency to harm the surrounding neighborhoods.[34] All but one justice agreed that the classification used to impose more severe restrictions on adult theaters was based on the content of the films displayed.[35] Five justices opined that, if one did not consider the

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rejected the argument as invalid since films without nudity were just as likely to distract motorists. *Id.* at 215. The Court recognized that restrictions based on the content of speech would only be upheld when the speech intruded on the home or when there was a captive audience. *Id.* at 209; *cf* Lehman v. Shaker Heights, 418 U.S. 298, 302-04 (1974) (passengers on city-owned buses were captive audience).

[30] *Erznoznik*, 422 U.S. at 212 n.9. In conclusion the Court stressed that although the interest advanced by the city was legitimate, ordinances which infringed upon first amendment rights must have been precisely drafted to show their purpose clearly in order to pass constitutional muster. *Id.* at 217-18; *see supra* note 17 and accompanying text; *see also* Comment, *Privacy vs. Free Expression in Public Areas*, 28 U. FLA. L. REV. 588, 588-96 (1976)(views *Erznozink* as resulting from increases in population, technological advances and unequal progression of sexual mores throughout society).

[31] 427 U.S. 50 (1976).

[32] *Id.* at 52. The ordinance stated that theaters classified as adult could not locate within 1,000 feet of any two other regulated uses or within 500 feet of a residential area. *Id.* at 52. The other regulated uses included adult bookstores, bars, hotels, pawnshops, pool halls, shoeshine parlors, and several other establishments. *Id.* at 52 n.3.

[33] *Id.* at 52.

[34] *Id.* at 54. The decision to amend a 1972 "Antiskid Row Ordinance" to include adult theaters was partly based on the increase in the number of such theaters in the city. *Id.* at 54-55 & n.8. Urban planners and real estate experts who supported the ordinance opined that the concentration of several adult businesses in the same neighborhood attracted undesirable transients, caused a decline in property values, caused an increase in the amount of crime and encouraged residents and businesses to move away. *Id.* at 55.

[35] *Id.* at 53, 63 (Justice Stevens' plurality opinion joined by Chief Justice Burger, Justice White and Justice Rehnquist); *Id.* at 84, 88 (Justices Stewart, Brennan, Marshall, and Blackmun dissenting). *See generally* Costonis, *Law and Aesthetics*, 80 MICH. L. REV. 355, 451-52 & n.347 (1982)(analysis of decision in *Young* noting division and reasoning of Court).

fact that the ordinance discriminated among theaters based on the content of the films displayed, then the regulation of the location at which the display occurred did not violate the first amendment.[36] However, a majority could not agree on the effect of an equal protection challenge to the ordinance's classification scheme which provided that adult theaters would be treated differently than other movie theaters.[37] Four of the justices who joined the plurality opinion expressed the view that society's interest in the protection of the type of expression affected by the ordinance was very different and of lesser importance than society's interest in the protection of other types of speech.[38] In the opinion of these justices, both nonobscene sexually explicit films and political debate were protected by the first amendment from total suppression, but only the former type of speech could be legitimately subjected to restrictions that were not content-neutral.[39] Finally, those justices agreed that the city's interests in its neighborhoods and quality of life were substantial and as such justified the use of film content as the basis for placing adult theaters in a different category from other theaters.[40]

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[36] *Young*, 427 U.S. at 62.

[37] *Id.* at 63-73. Justice Powell, who concurred in all but part III of Justice Stevens' majority opinion, reviewed the ordinance largely under the standards set out in United States v. O'Brien, 391 U.S. 367 (1968). *Young*, 427 U.S. at 79. Justice Stewart in his dissenting opinion pointed out that precedent required that content-based time, place and manner restrictions be upheld only when the restriction protected a captive or juvenile audience. *Id.* at 86. Justice Stewart quipped that the Court had riden "roughshod over the cardinal principles of First Amendment law" and replaced these principles with the dictates of "current popular opinion." *Id.* at 85-86.

[38] *Young*, 427 U.S. at 70. This section of Justice Stevens' opinion contained his famous remark that "[b]ut few of us would march our sons and daughters off to war to preserve the citizen's right to see 'specified sexual activities' exhibited in the theaters of our choice." *Id.*

[39] *Id.* at 70-71.

[40] *Id.* at 71-73. In reaching this conclusion, the justices stated that they would be very deferential to a city's conclusion as to the effects of adult theaters on its neighborhoods. *Id.* at 71-72 & n.34. In the footnote that gave constitutional law the term "secondary effect," Justice Stevens distinguished *Young* from *Erznoznik* because in the latter case the only secondary effect on which the city relied was the speech's impact on traffic. *Young*, 427 U.S. at 71 n.34; *see supra* notes 28-29 and accompanying text. *See generally* Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854 (1983)(views *Young* as manifestation of increasing opposition within Court to broad content-neutral doctrine espoused in Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972)).

In the 1981 case of *Schad v. Borough of Mount Ephraim*[41] the United States Supreme Court invalidated a zoning ordinance which effectively operated to ban all live entertainment, namely in the form of nude dancing, from a city.[42] In *Schad*, the borough had zoning laws which expressly listed all permitted uses and forbade all other uses.[43] Live entertainment was not expressly permitted; hence, some adult bookstore operators were charged and convicted for the violation of zoning laws, after they installed coin-operated machines which allowed patrons to view live nude dancing.[44] The Court overturned the convictions because the borough's justifications for the total ban failed to withstand judicial scrutiny.[45] Also in 1981, in *Heffron v. International Society for Krishna Consciousness, Inc.*,[46] the United States Supreme Court upheld a state rule which regulated the location of where the distribution of printed or written material could take place on the state fair grounds.[47] The state applied this rule to a religious group and such rule operated to curtail the exercise of one of the group's rites.[48] The Court upheld the

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[41] 452 U.S. 61 (1981).

[42] *Id.* at 77.

[43] *Id.* at 63 & nn.1-2.

[44] *Id.* at 62. The state court, in construing the ordinance, stated that live entertainment, of any kind, was not permitted by the statue. *Id.* at 65. However, live entertainment was allowed in Mount Ephraim at three establishments that provided such entertainment prior to the enactment of the zoning ordinance. *Id.* at 64 n.3.

[45] *Id.* at 71-77. The Court held that a zoning ordinance which infringed upon a protected liberty must have been narrowly drawn and must have served a sufficiently substantial governmental interest. *Id.* at 68. The interests set forth by the borough to justify the ordinance were that live entertainment would conflict with the city's plan to create a commercial area that met only the immediate needs of its citizens and would cause special problems in traffic and city services. *Id.* at 72-74. The Court rejected the ordinance as being overly broad and the interest advanced insufficient. *Id.* at 74. When the borough tried to characterize the ordinance as a reasonable time, place, and manner restriction, the court added a requirement that the law leave open adequate alternative channels of communication, which the total ban failed to accomplish. *Id.* at 75-77. *See generally* Note, *Zoning Regulation-Constitutional Limitations-Schad v. Borough of Mount Ephraim*, 28 N.Y.L. SCH. L. REV. 749, 758-59 (1983-84)(author finds *Schad* inadequate as guideline to lawmakers, leaving many unanswered questions).

[46] 452 U.S. 640 (1981).

[47] *Id.* at 656.

[48] *Id.* at 645. The religious ritual involved members going to public places to sell religious literature and to obtain donations. *Id. Compare* Note, *Heffron v. International Society for Krishna Consciousness, Inc.: Confusing Free Speech with Free Exercise*

rule against constitutional attack since the rule was a content-neutral[49] time, place, and manner regulation which served a significant government interest[50] and allowed alternative forums for expression.[51]

More recently in the 1984 case of *City Council of Los Angeles v. Taxpayers for Vincent*,[52] a majority of the United States Supreme Court upheld a city ordinance which prohibited the posting of any signs, regardless of content, on city property.[53] The Court reasoned that since the law was a content-neutral regulation[54] of the manner of speech, then it was within the constitutional power of a city to use its police power to advance aesthetic values.[55] The Court also found that the visual assault

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Rights, 71 CALIF. L. REV. 1012, 1029 (1983)(concluded that Court decided *Heffron* on wrong grounds) *with* Note, *Constitutional Law-First Amendment-"Booth" Rule at State Fair Upheld as Valid Time, Place, and Manner Restriction on Freedom of Expression*, 12 CUM. L. REV. 693, 708-10 (1982)(viewed decision as logical extension of law).

[49] *Heffron*, 452 U.S. at 648-49. The rule required that everyone who wished to sell or distribute materials during the fair do so from a fixed location or booth. *Id.* at 643. This rule was applied on a nondiscriminatory basis to everyone and booths were rented out on a first-come, first-serve basis. *Id.* at 644.

[50] *Id.* at 654. The United States Supreme Court reasoned that the state's interest in protecting the safety and convenience of persons at the fair by maintaining the orderly movement of the crowds served a substantial state interest. *Id.* at 649-54.

[51] *Id.* at 654-55. The Court reasoned that, since the rule did not control the religious group's activities outside the fairgrounds, and still allowed for one-on-one contact between the group and fairgrounds, then the rule did allow for alternative forums for expression. *Id.* at 654-56.

[52] 104 S. Ct. 2118 (1984).

[53] *Id.* at 2136.

[54] *Id.* at 2129. The ordinance allowed city employees to remove all posters attached to city property, *i.e.*, utility poles. *Id.* at 2122. The ordinance on its face was neutral as to the content of prohibited signs. *Id.* at 2128. The Court adopted the lower court's finding that the ordinance was applied evenhandedly to all posters regardless of content. *Id.* at 2128-29. The Court also pointed out that the ordinance prohibited a certain manner of speech. *Id.* at 2128.

[55] *Id.* at 2129. The Court applied the standard of review enunciated in United States v. O'Brien, 391 U.S. 367 (1968). *Taxpayers for Vincent*, 104 S. Ct. at 2129. The *O'Brien* test was originally developed to apply to laws that regulated the conduct part of symbolic speech. *O'Brien*, 391 U.S. at 376-77. *O'Brien* stated that a government regulation curtailing speech was sufficiently justified if:

> (1) it is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restrictions on alleged first amendment rights are no greater than is essential to the advancement of the state's interest.

caused by signs posted on public property constituted such a significant evil that the city had a substantial interest in prohibiting it.[56] The Court concluded that the ordinance banned all signs from public property because of the visual clutter caused by such signs; therefore, the ordinance impaired speech no greater than necessary to accomplish the city's purpose of ending this visual clutter.[57]

In the instant case, the United States Supreme Court found that the city's ordinance was merely a regulation of location and not a total ban on adult theaters, and as such should be viewed as a form of time, place, and manner restriction.[58] In addition, the Court reasoned that the ordinance was directed not at the content of films but at the secondary effects of theaters showing a certain type of film, and hence, the ordinance was a content-neutral regulation of speech.[59] Furthermore, the Court recognized that since the ordinance was a form of time, place, and manner restriction, then the Constitution required that the ordinance be designed to pursue a substantial governmental interest and allow for reasonable alternative avenues of communication.[60] As to this first constitutional hurdle, the Court stated that, since information existed regarding the effects of adult theaters on urban life, a city could justifiably rely on such informa-

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Id. at 377. *See generally* Note, *The Political Boycott: An Unprivileged Form of Expression*, 1983 DUKE L.J. 1076, 1083-84 (1983)(viewed boycotts as nonverbal speech; Court misapplied *O'Brien* test to balance interest when in reality test required law to manifest four distinct qualities).

In applying part four of the test, the Court interjected that "the incidental restriction on expression which results from the city's attempt to accomplish such a purpose is considered justified as a reasonable regulation of time, place, or manner of expression if it is narrowly tailored to serve that interest." *Taxpayers for Vincent*, 104 S. Ct. at 2130.

[56] *Taxpayers for Vincent*, 104 S. Ct. at 2130.

[57] *Id.* at 2131-32. *See generally* Kramer, *Members of the City Council v. Taxpayers for Vincent: A Step Backward for Political Campaigning*, 17 URB. LAW 91, 96-106 (1985)(stating that precedent, political realities, and missed opportunity called for reversal of *Taxpayers for Vincent*).

[58] *Renton*, 106 S. Ct. at 928. The Court recognized that *Young* dictated its decision in *Renton*. *Id.*

[59] *Id.* at 929. The Court concluded that the findings of the district court were adequate to prove that the city's ordinance was not directed at the suppression of speech. *Id.* The district court had found that the city's predominant concerns were with the secondary effects of the adult theaters on a community and not the theater's speech. *Id.*

[60] *Id.* at 928, 930.

tion to prove an ordinance which restricted the location of adult theaters served a substantial governmental interest.[61] As to the second hurdle, the Court reasoned that the ordinance did not unreasonably restrict alternative avenues of communication because the ordinance allowed adult theaters to locate in five percent of the city.[62] Furthermore, the Court recognized that the ordinance affected only those theaters shown to produce the unwanted secondary effects, and thus, the ordinance met the constitutional requirement of being narrowly tailored.[63] Consequently, the Court concluded that the ordinance met the requirements of the first amendment because the ordinance was a valid content-neutral exercise of a city's zoning power which, while advancing the city's interest in preserving its neighborhoods, also protected the interests of adult theaters and their customers by providing locations for the displaying and viewing of adult nonobscene films.[64]

In his dissenting opinion, Justice Brennan, joined by Justice Marshall, reasoned that since the ordinance selectively imposed limits on the location of adult theaters, the ordinance could not correctly be analyzed as a content-neutral time, place, and manner restriction on speech.[65] The dissent further explained that

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[61] *Id.* at 931. The Court held that the city was entitled to rely on the detailed findings outlined in Northend Cinema, Inc. v. Seattle, 585 P.2d 1153 (Wash. 1978), and on the experiences of other cities. *Renton*, 106 S. Ct. at 931. The Court supported its finding of a substantial governmental interest by reiterating the high respect accorded Detroit's interest in attempting to preserve the quality of urban life in *Young*. *Id.* at 930-31.

[62] *Renton*, 106 S. Ct. at 932.

[63] *Id.* at 931. The Court pointed out that this was the fatal flaw in *Schad* and *Erznoznik*. *Id.* at 931.

[64] *Id.* at 932-33. The Court found that adult theaters created a serious problem but the government's response was not directed at suppressing speech. *Id.* at 932. Furthermore, the Court concluded that the *essence of zoning* was to reserve some areas of land for certain activities while at the same time preserving the quality of life of a community by the restriction of those activities in other areas. *Id.* (emphasis added).The Court also rejected the theater's arguments that the ordinance violated the due process clause and equal protection clause of the fourteenth amendment. *Id.* at 933 n.4; *see supra* note 3 and accompanying text.

[65] *Renton*, 106 S. Ct. at 933 (Brennan, J., dissenting). The dissent reasoned that the ordinance imposed limitations based entirely on the films' content. *Id.* The dissent also maintained that the facts did not justify a different treatment of adult theaters from other adult businesses. *Id.* at 934. For this reason the ordinance was clearly aimed at the content of the adult films and not the secondary effects created by the theaters. *Id.* at

since the restriction was based on content, it must be closely scrutinized to ensure that the city was not acting as a censor of protected speech.[66] In applying this strict scrutiny, the dissent found that the city's motivations were questionable, suggesting an improper content based restriction, thus rendering the ordinance unconstitutional.[67] Finally, the dissent concluded that even if one applied the standards adopted by the majority, the ordinance remained unconstitutional.[68]

In *Renton* the Court makes clear that the appropriate standard of review for zoning ordinances which regulate the "place" where speech may occur, in the form of adult films, is the traditional standard applied to other time, place, and manner restrictions.[69] However, the *Renton* opinion makes considerable inroads on this standard in its traditional form, because the Court, in order to make a determination of constitutionality, focuses not on the means employed by the statute but on the ends the statute seeks to obtain.[70] Earlier Courts refused to focus on a statute's purported purpose, no matter how laudable, in order to determine the law's content-based nature and thus constitutionality.[71] This change in focus reveals the Court's illogical aversion

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934-35.

[66] *Id.* at 934. The dissent did not accept the idea that an ordinance, which imposed special restrictions on specific institutions engaged in certain kinds of speech based on the content of that speech, was not designed to suppress the content of that speech. *Id.*

[67] *Id.* at 934-35. The dissent noted that the city amended the ordinance, shortly after the lawsuit was filed, in order to explain its intention to control secondary effects associated with the adult theaters and, thus, the "legislative history" of the ordinance suggested a different result. *Id.* at 935-36. The Court, according to the dissent, had mistakenly accepted the post-hoc statements of the city at face value. *Id.* at 935. The dissent also explained that the City of Renton never actually reviewed the studies of other cities and adopted different zoning regulations than those studies advised. *Id.* at 926. Thus, the city had no basis to decide which studies were relevant or what solutions would effectively confront the problems the city sought to address. *Id.* at 936.

[68] *Id.* at 937. The dissent based this conclusion on the fact that the city was only aware that some of its citizens complained about adult theaters and that other cities had adopted zoning laws in dealing with these theaters. *Id.* The dissent concluded that this was not sufficient to prove the ordinance was narrowly tailored to serve a significant governmental interest. *Id.* Secondly, the dissent reasoned that the ordinance seriously limited the locations available for adult theaters, therefore the ordinance did not leave open ample alternative channels for communication. *Id.* at 937-38.

[69] *Renton*, 106 S. Ct. at 928. *See supra* notes 58-64 and accompanying text.

[70] *See supra* note 59 and accompanying text.

[71] *See supra* note 16 and accompanying text.

or outright refusal to call the statute in *Renton* content-based. One of the few things on which the justices in *Young* could agree was that the statute involved in that case, identical in many respects to the statute in *Renton*, was a content-based restriction on speech.[72] Simply stated, this change in focus in *Renton* allowed the Court to uphold the statute without espousing a comprehensive theory which justified making some speach, in the form of adult theaters, susceptible to content-based restrictions. Since previous Courts have declared that in certain situations content-based statutes are permissible, the present case could have been decided on less tenuous and more consistent grounds by simply adding another category to the list of exceptions already in place.[73]

In the future, *Renton* will allow almost any city to pass laws which herd unwanted adult theaters onto small but useable percentages of a city's acreage. The possible aggregate effect on free speech is startling since few cities could not obtain and subsequently rely on the studies of other cities in order to justify restricting adult theaters.[74] In effect, the Court has ruled that there already exists a sufficient amount of evidence to link harmful effects to adult theaters. Therefore, cities, no matter what their actual circumstances, may use this link to justify location restrictions.[75] While not a blow for freedom, *Renton* still preserves a sphere of protection for speech highly vulnerable to attack by political majorities. While *Young* seems better orchestrated to remind city dwellers that free speech is secured to everyone,[76] *Renton* allows a political majority, cloaked in the armor of their newfound reliance on outside studies and the United States Supreme Court's blessings, to banish certain types of speech to the outer reaches of their realm.[77] While such may be the "essence of zoning"[78] it seems much more like the essence of raw political might unleashed on minority views. It was this

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[72] *See supra* note 35 and accompanying text.
[73] *See supra* notes 30, 37 and accompanying text.
[74] *See supra* note 61 and accompanying text.
[75] *See supra* notes 61, 64 and accompanying text.
[76] *See supra* note 33 and accompanying text.
[77] *See supra* note 62 and accompanying text.
[78] *Renton*, 106 S. Ct. at 932.

type of political might which the first amendment was adopted to check. In conclusion *Renton* allows the social ills that purportedly accompany adult theaters, with the exception of neighborhood deterioration, to be placed in an "out of sight and out of mind" situation. Instead of reminding cities that they need to develop direct means to alleviate society's problems without infringing on free speech, the Court simply condones the driving of a scapegoat to the city's outer limits where the social ills supposedly caused by adult theaters, like the films and theaters themselves, will not offend or affront those in the political majority.

Jim Bobo

Constitutional Law — Right of Access To Criminal Proceedings — Qualified First Amendment Right of Access Attaches to Pretrial Hearings Absent Overriding Interest Protected Only by Closure

Petitioner,[1] seeking access to transcripts of a preliminary hearing in a criminal prosecution,[2] filed a petition for a peremptory writ of mandate with the California Court of Appeal.[3] Upon commencement of the preliminary hearing,[4] the defendant moved to exclude the public from the proceeding.[5] The unopposed motion was granted.[6] At the conclusion of the hearing, petitioner was denied access to the transcripts.[7] The California Court of Appeal denied the writ of mandate.[8] The California Su-

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[1] Petitioner was Press-Enterprise Company, a member of the news media. Press-Enterprise Co. v. Superior Court of Cal., 106 S. Ct. 2735, 2738-39 (1986).

[2] *Id.* at 2738. The state of California commenced prosecution in the Riverside County Municipal Court charging the accused, Robert Diaz, with twelve counts of murder. *Id.* Diaz, a nurse, allegedly murdered twelve patients by administering massive doses of lidocaine. *Id.*

[3] *Press-Enterprise*, 106 S. Ct. at 2739. The court originally denied the writ but, upon subsequent order by the California Supreme Court, set the matter for hearing. *Id.*

[4] *Id.* at 2738. The preliminary hearing commenced on July 6, 1982, and lasted for 41 days. *Id.*

[5] *Id.* The motion was brought pursuant to Cal. Penal Code § 868 (West 1985), which required open proceedings unless "exclusion of the public [was] necessary in order to protect the defendant's right to a fair and impartial trial." *Press-Enterprise*, 106 S. Ct. at 2738.

[6] *Press-Enterprise*, 106 S. Ct. at 2738. The state introduced predominantly medical and scientific evidence, as well as testimony of the defendant's co-workers; the defense introduced no evidence, but did subject the state's witnesses to "vigorous" cross examination. *Id.* The magistrate found that closure was necessary in light of the attendant national publicity and of the potential for one-sided press coverage. *Id.*

[7] *Id.* The magistrate refused petitioner's request that the transcripts be released and sealed the record. The state, later joined by the petitioner, moved in superior court to have the transcripts released to the public. *Id.* The defendant opposed the motion, asserting that such release would result in "prejudicial pre-trial publicity." *Id.* After the superior court denied the motion, petitioner filed the instant writ of mandate. *Id.* at 2739.

[8] *Id.* at 2739. Prior to the hearing, defendant waived his right to a jury trial and the superior court released the transcript. *Id.* After holding that the controversy was not moot, the writ of mandate was denied by the court of appeal. *Id.*

preme Court affirmed.[9] On writ of certiorari, the United States Supreme Court, *held*, reversed. The qualified first amendment right of access attaches to criminal pretrial hearings; therefore, preliminary hearings cannot be closed to the public absent specific findings that closure is essential to preserve an overriding interest. *Press-Enterprise Co. v. Superior Court of California*, 106 S. Ct. 2735 (1986).

The tradition of open court originated in Anglo-Saxon England before the Norman Conquest.[10] The character of public openness remained constant despite the rapid evolution of procedure in the early courts.[11] Colonial American courts followed the English common-law tradition of open court proceedings.[12]

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[9] *Id.* The California Supreme Court concluded there was no general first amendment right of access to preliminary hearings. *Id.* The first amendment provided in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

The court reasoned that the first amendment right of access to criminal proceedings extended only to actual criminal trials. *Press-Enterprise*, 106 S. Ct. at 2739. The California Supreme Court further ruled that closure would be proper under the California Access Statute, CAL. PENAL CODE § 868, if the defendant established a "reasonable likelihood of substantial prejudice." *Press-Enterprise*, 106 S. Ct. at 2739.

[10] Pollock, *English Law Before the Norman Conquest*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 88, 89 (1907). Attendance at these "open air" meetings was compulsory of the freemen who rendered justice. *Id.; see* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 10-12 (7th ed. 1966)(tracing development of English law). As the system of justice changed, the obligation of the freemen to attend trials became more relaxed and a process of conducting trials by means of a jury evolved. *Id.* at 316. With the passage of the Statute of Marlborough, 1268, 52 Hen. 3, ch. 10, certain groups were statutorily excused from compelled attendance. 1 HOLDSWORTH, *supra* at 79 (archbishops, bishops, pryors, abbots, earls, barons, persons in orders, women excused unless specially required)(footnote omitted).

[11] POLLOCK, THE EXPANSION OF THE COMMON LAW 31-32 (1904). The presumption of openness was to guarantee a fair trial and to discourage perjury, misconduct, and biased decisions. 3 W. BLACKSTONE, COMMENTARIES *372-73.

[12] *See, e.g.*, 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 129, 140 (1971)(West New Jersey provided "that in all public courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts . . ."); *Id.* at 140 (Pennsylvania provided "that all courts shall be open . . ."); Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 405-06 (1907)(discussion of colonists' attempt to follow English jury system). In an address to the inhabitants of Quebec explaining the advantages of a free English government, a committee of the first Continental Congress wrote:

> [O]ne great right is that of trial by jury. This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexception-

Following the adoption of provisions guaranteeing the right of the accused to a public trial in a state constitution in 1776,[13] and the ratification of the sixth amendment[14] in 1791, the practice of conducting criminal trials in open forum gained official recognition in other early states.[15] Evidence indicated that the open form of court proceedings was intended to ensure the accused's right to a fair trial.[16] Additionally, early commentators suggested that the public had an equal right to be present for the purpose of observing justice.[17]

The United States Supreme Court in 1948 addressed the is-

> able countrymen and peers of his vicinage, who from that neighborhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full inquiry, face to face, in open Court, before as many of the people as chuse [sic] to attend, shall pass their sentence upon oath against him . . . .

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 568-69 (1980)(citing 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 101, 107 (1904)).

[13] N.C. CONST. of 1776, Declaration of Rights IX, in 5 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 2787 (1909) [hereinafter cited as Thorpe] (unanimous verdict of jury in open court required for conviction of freeman); PA. CONST. of 1776, Declaration of Rights IX, in 5 Thorpe, *supra* at 3083 (accused in criminal prosecution guaranteed "speedy public trial, by an impartial jury of the country").

[14] The sixth amendment provides in pertinent part that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

[15] *See* DEL. CONST. of 1792, art. I, § 7, in 1 Thorpe, *supra* note 13, at 569 ("[T]he accused hath a right to . . . a speedy and public trial by impartial jury . . . ."); KY. CONST. of 1792, art. XII, cl. 10, in 3 Thorpe, *supra* note 13, at 1274-75 ("[T]he accused hath a right to . . . a speedy public trial by an impartial jury . . . ."); MICH. CONST. of 1835, art. 1, § 10, in 4 Thorpe, *supra* note 13, at 1931 ("[T]he accused shall have the right to a speedy and public trial by an impartial jury . . . ."); MISS. CONST. of 1817, art. I, § 10, in 4 Thorpe, *supra* note 13, at 2033 ("[T]he accused hath a right to . . . a speedy public trial, by an impartial jury of the country . . . ."); TENN. CONST. of 1796, art. XI, § 9, in 6 Thorpe, *supra* note 13, at 3422 ("[T]he accused hath a right to a speedy public trial, by an impartial jury . . . ."); TEX. CONST. of 1845, art. I, § 8, in 6 Thorpe, *supra* note 13, at 3548 ("[T]he accused shall have a speedy public trial by an impartial jury . . . ."); VT. CONST. of 1777, ch. I, Declaration of Rights X, in 6 Thorpe, *supra* note 13, at 3741 ("[A] man hath a right to . . . a speedy public trial, by an impartial jury . . . .").

[16] 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927). *See generally* Note, *The Accused's Right to a Public Trial*, 42 NOTRE DAME L. REV. 499, 499-501 (1967)(tracing public trial history); Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U. L. REV. 1138, 1138-51 (1966)(discussion of source and extent of right to public trial).

[17] *See, e.g.*, 3 W. BLACKSTONE, COMMENTARIES *372-73 (stating that open examination of witnesses promotes truthful testimony).

sue of an accused's right to a fair trial in open court in *In re Oliver*.[18] In *Oliver*, the immediate conviction and sentencing of a subpoenaed witness for contempt of court during a secret "one-man grand jury"[19] was challenged and declared unconstitutional under the due process clause of the fourteenth amendment.[20] The *Oliver* Court recognized that grand jury proceedings, with good reason, had a tradition of secrecy.[21] However, the Court concluded that these reasons did not justify the secret conviction of an accused in a trial.[22] In reaching this justification the *Oliver* Court maintained that, at a minimum, friends, relatives, and counsel of the accused should be present.[23]

While *Oliver* stood for the proposition that an accused has the right to a fair trial in open court, the Court in 1966 examined the effect of adverse publicity on the defendant's right

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[18] 333 U.S. 257 (1948).

[19] *Id.* at 258-59. Following testimony regarding an investigation of alleged gambling and official corruption, the Michigan circuit judge expressed disbelief as to the truthfulness of the witness's story and immediately charged, convicted, and sentenced the witness to jail for 60 days. The judge's decision rested upon inconsistent testimony given by a prior witness. *Id.* The convicted witness had no opportunity to obtain counsel, prepare a defense, cross examine the earlier grand jury witness, or summon any witnesses to refute the charge. *Id.*

[20] *Id.* at 273, 278. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[21] *Oliver*, 333 U.S. at 264 (citing Hale v. Henkel, 201 U.S. 43, 58-66 (1906)); *see also* United States v. Sells Engineering, Inc., 463 U.S. 418, 423-24 (1983)(secrecy of grand jury required to maintain dual functions of determining if crime has been committed and to protect citizens against unfounded prosecutions); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979)(proper functioning of grand jury system depended upon secrecy); United States v. Proctor & Gamble Co., 356 U.S. 677, 681 (1958)(court recognized long-established policy "of secret grand jury proceedings"); United States v. Johnson, 319 U.S. 503, 513 (1943)(court described grand jury secrecy as "indispensable").

[22] *Oliver*, 333 U.S. at 264. The Court reasoned that the grand jury does not convict nor render judgment, and an accused cannot be sentenced until afforded due process before judges sitting in open court. *Id.* at 265.

[23] *Id.* at 272. In considering the question whether an accused could be tried and convicted in a secret grand jury proceeding, the Court looked to the tradition of public openness in trials and was unable to find a single occurrence of a criminal trial totally closed to the public in any municipal, state, or federal court during this country's history. *Id.* at 266. In reaching its conclusion, the Court refused to rule on what groups, if any, could be constitutionally excluded from trial. *Id.* at 271.

to a fair trial in *Sheppard v. Maxwell.*[24] In reversing the conviction in a murder prosecution,[25] the Court in *Sheppard* held that the failure of the trial judge to protect the defendant from "inherently prejudicial publicity"[26] deprived the defendant of a fair trial.[27] Although the Court noted that direct limitations had not previously been placed upon the free access of the press,[28] and that justice cannot "survive behind silent walls,"[29] the Court refused to abdicate the decision of court matters to the news media.[30] Accordingly, the *Sheppard* Court held that the trial judge had the duty to ensure that prejudicial publicity never outweighed the defendant's right to a fair trial.[31]

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[24] 384 U.S. 333 (1966).

[25] *Id.* at 335. The state of Ohio convicted defendant, Dr. Sam Sheppard, in 1954 in the Court of Common Pleas of Cyuahoga County, Ohio, for the murder of his wife, Marilyn Sheppard. *Id.* at 335 n.1. The Court of Appeals for Cuyahoga County and the Ohio Supreme Court affirmed the conviction. *Id.*

[26] *Id.* at 363. For a detailed explanation of the pretrial and trial press coverage, *see id.* at 339-49 (jurors received calls, letters before trial, cameras in courtroom, interviews with jurors during stages of trial).

[27] *Id.* at 363.

[28] *Sheppard*, 384 U.S. at 350 (citing Craig v. Harney, 331 U.S. 367, 374 (1947))("what transpires in the courtroom is public property").

[29] *Sheppard*, 384 U.S. at 349 (citing *Oliver*, 333 U.S. at 268). The press "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard*, 384 U.S. at 350; *see, e.g.*, Waller v. Georgia, 467 U.S. 39, 46 (1984)(public trial ensures duties performed responsibly, encourages witness participation, discourages perjury); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 920 (1950)(Frankfurter, J., opinion respecting denial of certiorari to 193 Md. 300, 67 A.2d 497 (1949)); *Oliver*, 333 U.S. at 270 n.24 (public trials come to attention of unknown witnesses); United States v. Kobli, 172 F.2d 919, 924 (3d Cir. 1949)(general public should be admitted to every criminal trial); *cf.* Lewis v. Peyton, 352 F.2d 791, 792 (4th Cir. 1965)(secret trial can work for or against defendant). *But see* United States v. Powers, 622 F.2d 367 (8th Cir. 1980)(perjury may be promoted by openness due to fear of embarrassment). *See generally* I J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 523-25 (1827)(presence of public in courtroom encourages court officers to perform duty with increased conscientiousness and allows public to discover shortcomings of system).

[30] *Sheppard*, 384 U.S. at 350. "Legal trials are not like elections, to be won through use of the meeting-hall, the radio, and the newspaper." *Id.* (citing Bridges v. California, 314 U.S. 252, 271 (1941)). *Compare* Cox v. Louisiana, 379 U.S. 559, 583 (1965)(Black, J., dissenting)(freedom of speech should not divert purpose of court system) *with* Pennekamp v. Florida, 328 U.S. 331, 347 (1946)(open discussion given widest range compatible with requirement of fair administration of justice).

[31] *Sheppard*, 384 U.S. at 362. *Accord* Chambers v. Florida, 309 U.S. 227, 236-37 (1940)(reversing murder conviction obtained by use of forced confession, Court held that

The conflict between the public's first amendment right of access and the accused's sixth amendment right to a fair trial, clearly present in *Sheppard*, had yet to receive focused judicial scrutiny.[32] In 1979 the Court first examined the issue of whether the public had an independent constitutional right of access to pretrial judicial proceedings in *Gannett Co. v. DePasquale*.[33] However, the Court avoided the issue of whether the public had an independent first amendment right of access to criminal trials[34] by construing the sixth amendment to a narrow set of

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no one be punished for crime without fair charge in public tribunal free of prejudice). The *Sheppard* Court reasoned that steps could have been taken by the trial judge to protect the defendant's right to a fair trial, such as sequestration of jurors, change of venue, detecting juror prejudice in voir dire, and use of clear instructions to jury. *Sheppard*, 384 U.S. at 357-63; *see* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-64 (1976)(citing *Sheppard* with approval).

For cases addressing the prejudicial publicity question, see also Estes v. Texas, 381 U.S. 532, 544-52 (1965)(television broadcasts of court proceedings); Turner v. Louisiana, 379 U.S. 466, 471-74 (1965)(key witnesses doubled as jury shepards during trial); Rideau v. Louisiana, 373 U.S. 723, 723-26 (1963)(television exposure of community to defendant's personal confession of crime necessitated change in venue); Irvin v. Dowd, 366 U.S. 717, 723-28 (1961)(jurors exposed to prejudicial newspaper article); Marshall v. United States, 360 U.S. 310, 311-13 (1959)(jurors exposed to news accounts); Patterson v. Colorado, 205 U.S. 454, 462 (1907)(court ruled decision in case should be induced only by evidence in open court, not by outside influence, e.g., published articles and cartoons).

[32] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976)(Bill of Rights did not assign priorities between first amendment and sixth amendment). In addressing the use of closure orders to limit pretrial publicity, the *Nebraska Press* Court refused to establish a priority between the two rights. *Id.* Instead, the Court reversed the closure order by ruling that measures short of closure would protect against prejudicial publicity. *Id.* at 563-65.

Additionally, courts were at odds as to whether the sixth amendment's "right to a speedy and public trial, by an impartial jury" was a right personal to the defendant or one shared by the public. *See, e.g.*, Faretta v. California, 422 U.S. 806, 848 (1975)(Blackmun, J., dissenting)(specific guarantees of sixth amendment are personal to accused); Estes v. Texas, 381 U.S. 532, 538-39 (1965)(public trial required to guarantee that accused would not be unjustly condemned); *Id.* at 583 (Warren, C.J., concurring)(sixth amendment construed as guarantee to accused); *Id.* at 588 (Harlan, J., concurring)(right of public trial belonged to accused and not to public); *Oliver*, 333 U.S. at 270 n.25 (requirement of public trial for benefit of accused); Geise v. United States, 265 F.2d 659, 660 (9th Cir. 1959)(sixth amendment right was right of accused only), *cert. denied*, 361 U.S. 842 (1959). *But see* United States v. Cianfrani, 573 F.2d 835, 852 (3d Cir. 1978)(public trial involves societal interest distinct from parties involved). *See generally* Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 383-84 (1932)(doubtful that prisoner's interest created public trial practice).

[33] 443 U.S. 368 (1979).

[34] *Id.* at 392; *Id.* at 447 (Blackmun, J., joined by Brennan, White, and Marshall, J.J.,

facts.[35] The *Gannett* Court recognized that adverse publicity could threaten the possibility of a fair trial.[36] The Court also reasoned that publicity in a pretrial suppression hearing could be especially dangerous since the whole purpose of the hearing was to screen out unreliable or illegally obtained evidence.[37]. The Court concluded that, in appropriate circumstances, closure of a pretrial hearing was one of the most effective methods a trial judge could utilize to protect the trial from prejudicial publicity.[38] Thus the Court held that the public had no affirmative sixth amendment constitutional right to attend criminal trials[39]

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concurring in part and dissenting in part). In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581-82 (1980), Justice White, in his concurrence, stated that this case would have been unnecessary had *Gannett Co. v. DePasquale* [citation omitted] construed the sixth amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances.

[35] *Gannett*, 443 U.S. at 374-75. Defendants, arguing that adverse publicity would threaten their right to a fair trial, made an unopposed motion to exclude the public and press from a preliminary suppression hearing on November 4, 1976. *Id.* at 374-75. The United States Supreme Court granted certiorari to decide the sole question of whether the public had an independent constitutional right to insist upon access to a preliminary judicial hearing even though the parties to the litigation all agreed to closure. *Id.* at 370-71.

[36] *Id.* at 378. The costs of failure to afford the defendant a fair trial were high and in extreme cases required reversal. *See, e.g., Sheppard*, 384 U.S. at 358-63 (reversal due to prejudicial publicity); Estes v. Texas, 381 U.S. 532, 550-52 (1965)(reversal due to televising widely publicized criminal trial); Marshall v. United States, 360 U.S. 310, 312-13 (1959)(inadmissible evidence brought before jurors required reversal).

[37] *Gannett*, 443 U.S. at 379.

[38] *Id.*; *see also Gannett* at 378-79 n.5 (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-65 (1976)(other protective measures) and *Sheppard*, 384 U.S. at 358-62 (judge has significant discretion over access of media short of closure); *cf.* Rideau v. Louisiana, 373 U.S. 723, 723-26 (1963)(venue change required where television exposed community to confessions before defendant charged with crime).

[39] *Gannett*, 443 U.S. at 394. The Court recognized that the public had a strong interest in court proceedings. *Id.* at 383. The Court reasoned that openness improved testimony, induced witnesses to come forward, created a more efficiently maintained proceeding, and gave the public a general opportunity to view the judicial process. *Id.* The Court recognized that the public has a definite, concrete interest in administering justice swiftly and fairly. *Id.* at 383 (citing Bariger v. Wingo, 407 U.S. 514, 519 (1972)); *see* Patton v. United States, 281 U.S. 276, 312 (1930)(stating that criminal trial by jury accommodated public interests distinct from defendants).

However, the Court concluded that the existence of a public interest did not in itself create a constitutional right. *Gannett*, 443 U.S. at 383. The *Gannett* Court looked to the common law tradition of open court proceedings, but the majority rejected the concept that all common law rules had been elevated to the status of a constitutional right. *Id.* at 385-86. For cases that have allowed temporary exclusion see United States *ex. rel.* Or-

based upon the determination that the sixth amendment public trial right was for the defendant alone.[40]

As a result of four concurring opinions in *Gannett*[41] that differed on the scope of the holding and the appropriate standard to be used in closure cases, the reach of the public's right of access remained unclear. One year later, the Court in *Richmond Newspapers, Inc. v. Virginia*[42] addressed the precise issue of whether the criminal trial itself could be closed to the public without any evidence that closure was necessary to protect the defendant's right to a fair trial or that some other overriding interest existed. [43] The Court noted that the criminal trial had a presumption of openness under our system[44] and recognized the nexus between the aspect of openness and the perception of fairness.[45] The Court concluded that justice was best served by al-

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lando v. Fay, 350 F.2d 967, 971 (2d Cir. 1965)(outburst in court justified exclusion); Geise v. United States, 262 F.2d 151, 157 (9th Cir. 1958)(statutory rape of minor); Hogan v. State, 191 Ark. 437, 86 S.W.2d 931, 931-33 (1935)(exclusion during testimony of 10-year-old rape victim); Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423, 424 (1944)(improper exclusion of attorney from trial at which child forced to testify to violent acts); State v. Callahan, 100 Minn. 63, 110 N.W. 342, 345 (1907)(embarrassment would prevent effective testimony of rape victim).

The Court also noted that the English common law tradition of open court did not extend to pretrial hearings. *Gannett*, 443 U.S. at 389.

[40] *Gannett*, 443 U.S. at 380.

[41] *See, e.g., Gannett*, 443 U.S. at 394 (Burger, C.J., concurring)(pretrial hearing not "trial" within scope of sixth amendment); *Id.* at 397 (Powell, J., concurring)(public's interest in presence at pretrial suppression hearing protected by first and fourteenth amendments); *Id.* at 403-04 (Rehnquist, J., concurring)(majority opinion should not be interpreted to mean that "under the sixth amendment a trial court can close a pretrial hearing or trial only when there is a danger that prejudicial publicity will harm the defendant"). *See generally* Note, *Public Access to Pretrial Criminal Hearings: The Use of Closure Orders After Gannett v. DePasquale*, 44 ALB. L. REV. 455, 456-57, 469-70 (1980)(discussion of various opinions in *Gannett*).

[42] 448 U.S. 555 (1980).

[43] *Id.* at 564. At the commencement of defendant's fourth trial for murder (one reversal and two mistrials) on September 1, 1978, the Circuit Court of Hanover County, Virginia, granted defendant's motion for closed trial. *Id.* at 559-60.

[44] *Id.* at 573; *see id.* at 564-69 (recount of English common law development of open trials); *see also supra* notes 10-17 and accompanying text (historical development of open trials).

[45] *Richmond*, 448 U.S. at 570; *see, e.g.*, Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 920 (1950)(public judges whether system of criminal justice was fair); Craig v. Harney, 331 U.S. 367, 374 (1947)(trial was public event); Pennekamp v. Florida, 328 U.S. 331, 361 (1946)(public had deep interest in trials).

lowing the public to observe the judicial process.[46] Thus, absent an overriding interest,[47] the *Richmond* Court held that the implicit first amendment right of access guaranteed that the trial of a criminal case be open to the public.[48]

Although *Richmond* established that the public had a right of access to criminal trials, the problem of establishing a balance between the first and sixth amendments remained unclear due to the Court's failure to define "overriding interest."[49] Two years later, the Court in *Globe Newspaper Co. v. Superior Court*,[50]

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[46] *Richmond*, 448 U.S. at 572.

[47] *Id.* at 581. The Court found no evidence that suggested alternatives short of exclusion would not have preserved the defendant's right to a fair trial. *Id.* For other alternatives, see Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-65 (1976)(alternatives to closure); *Sheppard*, 384 U.S. at 357-62 (court may restrict prejudicial news accounts by several means without closing trial).

[48] *Richmond*, 448 U.S. at 580. The Court analogized the first amendment right of access to the first amendment right of assembly. *Id.* at 577. *But cf.* Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974)(regulation prohibiting interviews with prison inmates upheld); Pell v. Procunier, 417 U.S. 817, 834 (1974)(government has no duty to afford journalists information unavailable to general public). The Court distinguished *Saxbe* and *Pell* on the basis that access to a penal institution, not a traditionally open place, was the issue. *Richmond*, 448 U.S. at 576 n.11. The Court reasoned that the first amendment guaranteed the right to receive information as well as the right to speak or take action in public places. *Id.* at 578; *see* Commission for Indus. Org., 307 U.S. 496, 519 (1939)(freedom of speech and assembly for any lawful purpose are rights secured by fourteenth amendment). The right to assemble was, however, subject to time, place and manner restrictions. *E.g.*, Cox v. Louisiana, 379 U.S. 559, 562-64 (1965)(picketing on sidewalks); Cox v. New Hampshire, 312 U.S. 569, 576 (1941)(parade on public street without license). The Court then concluded that, although not in explicit terms, the right of access was implicitly guaranteed by the first amendment. *Richmond*, 417 U.S. at 580; *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982)(first amendment encompassed rights not specifically enumerated in exact terms). For examples of other implicit constitutional rights, see Estelle v. Williams, 425 U.S. 501, 512 (1976)(fourteenth amendment precludes state from compelling accused to stand trial in prison uniform); *In re* Winship, 397 U.S. 358, 361-68 (1970)(proof beyond reasonable doubt); Sharpiro v. Thompson, 394 U.S. 618, 629-31 (1969)(right to interstate travel); Stanley v. Georgia, 394 U.S. 557, 564-66 (1969)(right to privacy); Griswold v. Connecticut, 381 U.S. 479, 481-86 (1965)(right to privacy); NAACP v. Alabama, 357 U.S. 449, 460-66 (1958)(right of association).

[49] *Richmond*, 448 U.S. at 581 n.18. No specific examples of what might be an "overriding interest capable of closing a courtroom" were given. *Id.* However, the Court maintained there should be a finding that other alternatives fail before closure was proper. *Id.*; *see also* Comment, *Protecting Access to the Criminal Court*, 1981 ARIZ. ST. L.J., 1049, 1055 (1981)(uncertainty of "overriding interest").

[50] 457 U.S. 596 (1982).

reversing the closure order in a criminal trial,[51] clarified these uncertainties by establishing two considerations, "experience and logic", to determine if a right of access existed.[52] The Court concluded that, if a right of access existed, closure was proper only if "necessitated by a compelling governmental interest, and . . . narrowly tailored to serve that interest."[53]

The Court, in 1984, considered in *Press-Enterprise Co. v. Superior Court of California*[54] the issue of whether the public could be excluded from voir dire proceedings.[55] Extending the

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[51] *Id.* at 602. The Massachusetts Supreme Judicial Court had construed a Massachusetts statute to require mandatory closure under all circumstances during the testimony of a minor victim in a sex-offense trial. *Id.* at 600.

[52] *Id.* at 605-06. The Court examined the opinions of *Richmond* and found two considerations that explained why a right of access to criminal trials was protected by the first amendment. *Id.*

First, in formulating the consideration of "experience" the Court determined that criminal trials had historically been open to the public. *Id.* at 605. The Court also noted that the presumption of openness had not changed since common law. *Id.; see Richmond*, 448 U.S. at 564-73 (history of open trials); *Gannett*, 443 U.S. at 419 (Blackmun, J., joined by Brennan, White, and Marshall, J.J., concurring in part and dissenting in part)("common law from its inception was wedded to the Anglo-Saxon tradition of publicity"); *Oliver*, 333 U.S. at 266-71 (same); *supra* notes 10-17 and accompanying text (same); *see also Richmond*, 448 U.S. at 601 (Blackmun, J., concurring)(Justice Blackmun gratified that the Court looked to and relied upon legal history).

Secondly, extending "experience" into the consideration of "logic", the Court found that public access played a significant role in the proper functioning of the criminal justice system. *Globe Newspaper Co.*, 457 U.S. at 606. The Court viewed openness as a basic component of our self-governing structure and concluded that public access to criminal trials had fostered the aspects of fairness and integrity by permitting society to participate and serve as a check on the fact-finding process. *Id.* Thus, openness increased respect for the system and benefited the defendant and the community as a whole. *Id.; see Richmond*, 448 U.S. at 569-71 (value of openness); *Gannett*, 443 U.S. at 383 ("There is a strong societal interest in public trials"); *Id.* at 394 (Burger, C.J., concurring)(noting common law tradition of public trials); *Id.* at 428-29 (Blackmun, J., joined by Brennan, White and Marshall, J.J., concurring in part and dissenting in part)("societal values secured by the public trial are fundamental . . . to justice"); *Oliver*, 333 U.S. at 268-71 (noting Anglo-American distrust of secret trials); United States v. Lopez, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971)(closed trials might engender distrust of legal system).

[53] *Globe Newspaper Co.*, 457 U.S. at 607; *see* Brown v. Hartlage, 456 U.S. 45, 53-54 (1982)(compelling interest required for state circumscription of first amendment rights); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-03 (1979)(highest form of state interest required for prior restraints); NAACP v. Button, 371 U.S. 415, 438 (1963)(only compelling state interest justifies limitations on first amendment rights).

[54] 464 U.S. 501 (1984).

[55] *Id.* at 503. Before the voir dire examination in a case for the alleged rape and murder of a teenage girl in the California Superior Court, petitioner, Press-Enterprise

qualified first amendment right of access to voir dire,[56] the Court applied the two considerations set forth in *Globe*[57] and held that the presumption of openness may be overcome only by an overriding interest that was essential to the preservation of higher values and a finding that closure was "narrowly tailored to serve that interest."[58]

In the instant case, Chief Justice Burger, mindful of the tradition of public access to preliminary hearings[59] as conducted in

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Co., moved that voir dire proceedings be open to the public. *Id.* The state argued that access would hinder jurors' responses and thus threaten defendant's right to a fair trial. *Id.* The trial judge allowed access during "general voir dire" but approximately six weeks of the proceeding was closed to the public. *Id.* Petitioner unsuccessfully moved the trial court to release the transcript both after the jury was empaneled and after defendant's conviction. *Id.* at 503-04. Petitioner then sought a writ of mandate but the California Court of Appeal denied the petition and the California Supreme Court denied petitioner's request for a hearing. *Id.* at 504-05.

[56] *Id.* at 505-10. The right of access was not deemed to be absolute, but rather qualified. *Id.* at 509; *see also* Waller v. Georgia, 467 U.S. 39, 44 (1984)(qualified first amendment right of access to suppression hearing); *Globe Newspaper Co.*, 457 U.S. at 606 (right of access to criminal trial not absolute); *Richmond*, 448 U.S. at 581-82 n.18 (reasonable restrictions in order to preserve quiet, orderly setting for trial may be imposed); *Gannett*, 443 U.S. at 398 (Powell, J., concurring)(right of access limited by defendant's constitutional right to fair trial and by government's interest in obtaining just convictions while preserving confidentiality of certain information); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976)(first amendment guarantees not absolute but prior restraint of commentary on public judicial hearings is prohibited).

[57] *Press-Enterprise*, 464 U.S. at 509-13. The Court first reasoned that the traditional open trial was helpful for the purposes of jury selection. *Id.* at 505-09; *see also supra* notes 10-17 and accompanying text (historical development of open trials). The interests advanced in having an open trial have also been held to apply in preliminary suppression hearings. Elements such as the sworn testimony of witnesses, counsel arguing client's position, and the public interest in police misconduct were as applicable to preliminary hearings as to actual trials. Waller v. Georgia, 467 U.S. 39, 46-47 (1984)(citing *Gannett*, 443 U.S. at 397 n.1.); *see also* United States v. Cianfrani, 573 F.2d 835, 850 (3d Cir. 1978)(sixth amendment and policies underlying open trial apply to pretrial suppression hearing); United States v. Lopez, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971)(right of access attaches to suppression hearings), *cited with approval in* United States v. Clark, 475 F.2d 240, 247 (2d Cir. 1973). *But see Gannett*, 443 U.S. at 387-91 (pretrial hearings not traditionally open to public). The *Press-Enterprise* Court highlighted the important role of the open trial in promoting fairness in criminal trials and maintaining public confidence in the justice system. The Court concluded that the values of openness attached with equal pertinence to voir dire proceedings. *Press-Enterprise*, 464 U.S. at 508-09; *see also supra* notes 28, 52 (value of openness).

[58] *Id.* at 510; *see also supra* note 53 and accompanying text (interests required for closure).

[59] *Press-Enterprise*, 106 S. Ct. 2735, 2741 (1986). Since the superior court had al-

California, and of the perceived significance of public access in the proper functioning of the criminal justice system,[60] delivered the majority opinion holding that the qualified right of access implied in the first amendment attaches to preliminary hearings of criminal proceedings.[61] The majority maintained that since the qualified first amendment right of access applied to preliminary hearings of criminal proceedings,[62] then such proceedings should not be closed to the public unless specific on-the-record findings demonstrated by a "substantial probability"[63] that closure was essential to preserve higher values and unless such closure was closely tailored to serve that interest.[64] In the instant

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ready released the preliminary hearing transcript, the Court first addressed the issue of whether petitioner's prayer for relief was moot. *Id.* at 2739. The Court concluded that the controversy could repeatedly occur and escape review as a result of the typically short duration of criminal proceedings. *Id.* Therefore, the Court maintained the controversy was not moot. *Id.; see also Globe Newspaper Co.*, 457 U.S. at 602-03 (controversy is justiciable, "capable of repetition, yet evading review"); *Gannett*, 443 U.S. at 377-78 (same).

The Court then addressed the controversy and concluded that the historical considerations that applied to the first amendment right of access to criminal trials and to the selection of jurors also applied to preliminary hearings. *Press-Enterprise*, 106 S. Ct. at 2741. The majority also noted that prior decisions of state and federal courts had been almost uniform in allowing preliminary hearings to be held in open court, and, even in the minority of states that allow preliminary hearings to be closed, the hearings were presumptively open and closed only for cause shown. *Id.* at 2741-42.

[60] *Id.* at 2742. The Court maintained that preliminary hearings, as conducted in California, were sufficiently like a trial so as to apply the twin considerations of logic and experience as applied to first amendment right of access controversies. *Id.* The majority concluded that the preliminary hearing often was the final and most important step in criminal proceedings, and, in many cases, provided the sole occasion for public observation of the criminal justice system. *Id.* at 2742-43. The Court thus recognized that there was a value in openness of enhanced fairness and public confidence in the system. *Id.* at 2743 (citing *Press-Enterprise*, 464 U.S. at 508). As Chief Justice Burger stated, "The absence of a jury . . . makes the importance of public access to a preliminary hearing even more important." *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* The Court ruled that the "substantial probability" test is appropriate for the first amendment. *Id.* The majority reasoned that this test places a greater burden on the defendant moving for closure than the showing of a "reasonable likelihood of substantial prejudice" as required by the California Supreme Court. *Id.*

[64] *Id.* First, it must be shown to be substantially probable that unless the hearing is closed the defendant's right to a fair trial will be prejudiced, and second, it must also be shown that no other reasonable alternative would protect the defendant's rights. *Id.* at 2743.

case, the Court did not find by a "substantial probability" that closure was essential to the preservation of the accused's right to a fair trial, or that other reasonable alternatives could not have been fashioned to perfect the rights of the accused.[65] Consequently, the Court concluded that closure was inappropriate and that the preliminary hearing transcripts were shielded from the public in error.[66]

In a dissenting opinion,[67] Justice Stevens[68] argued that neither the majority's reasoning, nor the result it reached, in applying the "two complimentary considerations" of "experience and logic" was supported by precedent.[69] Therefore the majority's extension of the right of access to preliminary hearings should be precluded.[70] The dissent reasoned further that since the "two complimentary considerations" do not apply to preliminary hearings, then the first amendment standard for closure adopted by the majority[71] was too stringent and that the risk of prejudicing the defendant's right to a fair trial required an af-

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[65] *Id.* at 2744. The Court reasoned that the risk of prejudice does not automatically justify refusing public access. *Id.* Jurors with prior knowledge rendering them incapable of an impartial verdict can be identified through methods such as voir dire. *Id.* According to the Court, any limitation on access "must be narrowly tailored to serve that interest." *Id.*

[66] *Id.*

[67] *Id.* at 2744 (Stevens, J., dissenting).

[68] Justice Stevens was joined by Justice Rehnquist in the dissent. *Id.*

[69] *Id.* at 2747. The dissent noted that the line of cases giving rise to the consideration of history or tradition dealt with the right of access to criminal trials and the selection of jurors. *Id.* at 2747. In these situations a common law tradition of openness existed at the time the first amendment was ratified, thus suggesting an intention on part of the framers and ratifiers that these proceedings should remain open. *Id.* The common law right of access to preliminary hearings did not exist at the time the first amendment was adopted. *Id.* at 2748. The dissent therefore concluded that the framers and ratifiers could not have intended such proceedings to remain open. *Id.* at 2748.

The dissent further asserted that the logic consideration was applied by the majority in an unfounded manner. *Id.* at 2750. The dissenting justices strongly argued that the traditionally secret grand jury proceeding, as conducted in California, was as much a "final step" in a criminal proceeding as the preliminary hearing. *Id.* Further, the dissent argued that the function of the grand jury was identical to the preliminary hearing and thus reasoned that the adoption of this consideration was a mistake. *Id.* In conclusion, Justices Stevens and Rehnquist warned that, if carried to extremes, the right of access could be applied to traditionally secret grand jury proceedings or even beyond the criminal system to civil proceedings. *Id.* at 2750-51.

[70] *Id.* at 2747.

[71] *See supra* note 63.

firmance of the California Supreme Court's denial of the writ of mandate.[72]

As a result of *Press-Enterprise, II* the implicit qualified first amendment right of access[73] now extends to pretrial hearings[74] as well as to the trial itself.[75] Although the Court was clear in explaining the two "complimentary considerations"[76] of "experience and logic" for use in future right of access questions, the Court must be careful to apply the considerations in an even-handed manner. The tradition of openness must be considered in the light of the interests which it was developed to protect, the rights of the accused as well as the rights of the public.[77] Access to proceedings must be justified by more than a hollow reverence for tradition. Once the right of access is found to exist, this interest must be tempered by the accused's interest in a fair hearing of guilt or innocence by an impartial jury.[78] The competing interest of the individual defendant obligates the trial judge to use every option available[79] in order to protect the accused's fair trial right, and, in extreme situations, to exclude the public and press from the proceeding when this right is violated.[80]

Gram Meadors

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[72] *Press-Enterprise*, 106 S.Ct. at 2751.

[73] *See supra* notes 48, 56, 62 and accompanying text.

[74] *See supra* note 62 and accompanying text; *see also supra* note 57 and accompanying text (right extended to other aspects of trial).

[75] *See supra* note 48 and accompanying text.

[76] *See supra* notes 53, 60, 61 and accompanying text.

[77] *See supra* notes 16, 17, 28, 53, 60, 61 and accompanying text (value of openness).

[78] *See supra* notes 31, 36 and accompanying text.

[79] *See supra* notes 31, 38 and accompanying text.

[80] *See supra* notes 38-40, 63, 65 and accompanying text.

Constitutional Law — Right to Travel — When a State Statute Creates A Fixed-Date Residency Requirement, the Statute Must Withstand Strict Equal Protection Scrutiny

Plaintiffs[1] filed suit in the United States District Court for the Southern District of New York and sought declaratory and injunctive relief and retroactive seniority and back pay[2] from the defendant[3] for the denial of civil service employment preference points.[4] The State of New York, through its constitution[5] and its civil service law,[6] gave preference points in civil service employment to certain veterans of the United States Armed Forces who were residents of New York.[7] The plaintiffs moved for summary

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[1] Plaintiffs were Eduardo Soto-Lopez and Eliezer Baez-Hernandez. Attorney General of New York v. Soto-Lopez, 106 S.Ct. 2317, 2319 (1986).

[2] Soto-Lopez v. New York City Civil Serv. Comm'n, 755 F.2d 266, 269 (2d Cir. 1985), *aff'd sub nom.* Attorney General of New York v. Soto-Lopez, 106 S.Ct. 2317 (1986).

[3] *Soto-Lopez*, 755 F.2d at 266. The original defendants were the New York City Department of Personnel and others related to the department. *Id.* The Attorney General of the State of New York subsequently intervened and petitioned the Supreme Court. *Id.* at 269.

[4] *Soto-Lopez*, 106 S.Ct. at 2319.

[5] N.Y. Const. art. V, § 6. Any person who was a member of the United States Armed Forces during a time of war, who was honorably discharged, who was a resident of New York at the time of his entrance into the armed forces, and who was a resident of New York when he took the civil service employment examination was entitled to have five credit points added to his examination score. *Id.* If such person was disabled while he performed a duty during war, he was entitled to ten points additional credit. *Id.*

[6] N.Y. Civ. Serv. Law § 85 (McKinney 1986). The civil service law essentially restated the constitutional provision and defined relevant terms. *Id.*

[7] *Soto-Lopez*, 106 S.Ct. at 2319. Plaintiffs were American citizens born in Puerto Rico, and they had resided in Puerto Rico upon their entrance into the United States Army. *Soto-Lopez*, 755 F.2d at 268. Plaintiff Soto-Lopez entered the Army in 1961, was honorably discharged in 1963, and became a New York resident in 1965. *Id.* at 269. After he took the civil service employment examination and received five additional points to his original score, Soto-Lopez was called for interviews for a housing caretaker position. *Id.* When it was discovered that he was not a New York resident at the time he entered the Army, his five additional points were cancelled, and his name was withdrawn from consideration. *Id.*

Plaintiff Baez-Hernandez enlisted in the armed forces in 1958, was honorably discharged in 1960, and became a New York resident in 1968. *Id.* at 268. In 1970, Baez-Hernandez was recalled to active duty and was honorably discharged 15 days later when he became partially disabled. *Id.* After he took the civil service employment examina-

judgment[8] and claimed that the constitution and civil service law violated the equal protection clause of the fourteenth amendment[9] and the right to travel.[10] The claim asserted that the challenged provisions created an impermissible distinction between two classes of New York residents.[11] The defendants responded with a cross-motion for summary judgment[12] and offered four interests as justification for the alleged impermissible distinction.[13] The district court granted the defendants' motion for summary judgment and dismissed the complaint.[14] The United States Court of Appeals for the Second Circuit reversed and remanded.[15] On appeal, the United States Supreme Court, *held*, affirmed. When a state offers benefits based on a fixed time of residency, the effect of which is to exclude future residents from the enjoyment of such benefits, then the benefits must be narrowly tailored to accomplish a compelling state interest. *Attorney General of New York v. Soto-Lopez*, 106 S.Ct. 2317 (1986).

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tion, Baez-Hernandez received ten additional points to his original score and was subsequently appointed as a human resources specialist. *Id.* However, upon the discovery that he was not a New York resident when he entered into the Army, his points were rescinded and his appointment was withdrawn. *Id.*

[8] *Soto-Lopez*, 755 F.2d at 269.

[9] *Soto-Lopez*, 106 S.Ct. at 2319. "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[10] *Soto-Lopez*, 106 S.Ct. at 2319. Although the right to travel is not specifically set forth in the Constitution, the United States Supreme Court has long recognized the right to travel as a constitutionally protected right. *Id.* at 2320.

[11] *Soto-Lopez*, 755 F.2d at 269. The alleged impermissible distinction asserted by the plaintiffs was between veterans who were residents of New York when they entered the Army and those who were not, with only the former class entitled to veteran preference points. *Id.*

[12] *Id.*

[13] *Soto-Lopez*, 106 S.Ct. at 2324. The stated interests were: (1) to encourage the residents of New York to enter the armed forces; (2) to compensate resident veterans for their wartime service; (3) to persuade veterans to return to the state after service; and (4) to employ public servants with valuable military experience. *Id.*

[14] *Soto-Lopez*, 755 F.2d at 270. The district court concluded that it was neither a violation of the right to travel nor of the equal protection clause for New York to provide a hiring advantage in civil service employment for its resident veterans. *Id.*

[15] *Id.* at 282. The Second Circuit concluded that both the constitution and civil service law violated the equal protection clause of the fourteenth amendment and the constitutionally protected right to travel. *Id.*

The history of the constitutionally protected right to travel began with the Articles of Confederation which specifically protected the right of ingress and egress to any state.[16] However, when the Constitution replaced the Articles of Confederation, there was no mention of the right to travel.[17] Notwithstanding this noticeable absence, the Supreme Court consistently recognized the right to travel as a basic constitutional right[18] and arbitrarily protected this right under the privileges and immunities clause,[19] the commerce clause,[20] and the due process clause.[21] In some cases, the Supreme Court reasoned that the

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[16] ARTICLES OF CONFEDERATION art. IV, para. 1 (1781), *reprinted in* I UNITED STATES LIBRARY OF CONGRESS LEGISLATIVE REFERENCE SERVICE, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 398, 69th Cong., 1st Sess. 28 (1927). The founding fathers believed that in order to perpetuate mutual friendship, it was essential to allow citizens free ingress and egress to and from any state. *Id.*

[17] United States v. Guest, 383 U.S. 745, 758 (1966).

[18] *See* Oregon v. Mitchell, 400 U.S. 112, 237 (1970) (Brennan, J., concurring) (constitutional right of all citizens to unhindered interstate travel); United States v. Guest, 383 U.S. 745, 758 (1966) (right to travel has long been recognized as basic right under Constitution); Kent v. Dulles, 357 U.S. 116, 125 (1958) (right to travel was part of our constitutional liberty); Edwards v. California, 314 U.S. 160, 178 (1941) (Douglas, J., concurring) (right to pass freely from state to state was basic constitutional right); Paul v. Virginia, 75 U.S. (6 Wall.) 35, 44 (1867) (right to pass over any state's soil); Passenger Cases, 48 U.S. (7 How.) 283, 429 (1849) (Taney, C.J., dissenting) (constitutional right to pass through every part of United States without interruption). *See generally* Comment, *A Strict Scrutiny of the Right to Travel*, 22 UCLA L. REV. 1129, 1129-32 (1975) (right to travel as basic constitutional right discussed); Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 NEB. L. REV. 117, 117-21 (1975) (development of right to travel as basic constitutional right explained).

[19] *See* Slaughter House Cases, 83 U.S. (16 Wall.) 36, 80 (1873) (right of interstate travel was privilege of national citizenship); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) (privileges and immunities clause unmistakably protected right to travel); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) (privileges and immunities clause insured free ingress into and egress from any other state); Corfield v. Coryeel, 6 F. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1823) (right to pass through or reside in any state was privilege deemed to be fundamental).

[20] *See* United States v. Guest, 383 U.S. 745, 758 (1966) (federal commerce power authorized Congress to protect against infringements on right to interstate movement); Edwards v. California, 314 U.S. 160, 174 (1941) (state which prohibited transportation of indigent nonresidents into its territory violated commerce clause).

[21] *See* Zemel v. Rusk, 381 U.S. 1, 14 (1965) (right to travel could not be denied without due process of law); Apthecker v. Secretary of State, 378 U.S. 500, 508 (1964) (statute which made it felonious for communist to use passport invaded right to travel protected by due process clause); Kent v. Dulles, 357 U.S. 116, 125 (1958) (due process clause protected right to travel as part of liberty of which citizens could not be deprived). *See generally* Note, *The Right to Travel - Quest for a Constitutional Source*, 6

right to travel simply existed and there was no reason to designate a particular constitutional provision as the source of the right.[22] Regardless of which provision was considered the source of the right to travel, if any, the right withstood constitutional scrutiny in cases which dealt with issues that ranged from state taxation of travel[23] to private interference with travel.[24] The most recent line of cases which concerned the right to travel began with *Shapiro v. Thompson.*[25] *Shapiro* expanded the right to travel into the area of durational residency requirements.[26] In *Shapiro*,, the Supreme Court reviewed the constitutionality of three statutory provisions[27] which required an individual to live within the state for one year before being eligible for welfare assistance.[28] The Court determined that the three statutes were unconstitutional violations of the equal protection clause and the right to travel.[29] The *Shapiro* Court reached this conclusion

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RUT. - CAM. L.J. 122, 132-34 (1974) (examination of due process clause as source of right to travel).

[22] *See* United States v. Guest, 383 U.S. 745, 759 (1966) (there is no need to locate right to travel in Constitution since all members of Court agreed that such right existed); *accord* Graham v. Richardson, 403 U.S. 365, 375 (1971) (source of right to travel has never been ascribed to any particular constitutional provision).

[23] Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1868). The right to travel was relied upon by the majority of the Court to void a Nevada tax imposed on every person leaving the state. *Id.*; *see also* Ward v. Maryland, 79 U.S. (12 Wall.) 418, 432 (1871) (state tax invalidated based on right to travel).

[24] United States v. Guest, 383 U.S. 745, 760 (1966). In *Guest*, the Court concluded that a criminal conspiracy to deprive negro citizens of their right to travel into a certain part of the state of Georgia was unconstitutional. *Id.* at 760.

[25] 394 U.S. 618 (1969).

[26] *Id.* at 627. *See generally* McCoy, *Recent Equal Protection Decisions - Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987, 995-1003 (1975) (explanation of how *Shapiro* expanded right to travel).

[27] *Shapiro*, 394 U.S. at 622 n.1, 624 n.3, 626 n.5. The statutes reviewed were from Connecticut, the District of Columbia, and Pennsylvania. *Id.*

[28] *Id.* at 623, 625. The denial of welfare assistance in each case was on the ground that the applicants had not resided in the state or district for one year immediately preceding the filing of their applications. *Id.* All three district courts held that the statutes were an unconstitutional violation of the equal protection clause and/or the right to travel. *Id.* at 623, 625-26.

[29] *Id.* at 638. The Court rejected as constitutionally impermissible appellant's objectives that the durational residency requirements protected the fiscal integrity of the state public assistance programs, denied the entry of indigents into the state for the sole purpose of collecting higher benefits, and distributed resources based on community contributions. *Id.* at 627-32. It also rejected the argument that the requirement: (1) facilitated

on the basis that the durational residency requirements created two classes of indistinguishable resident families.[30] The residency requirement thus denied the ability to obtain welfare aid to only that class which had recently exercised its fundamental right to travel.[31] Since the classification infringed upon a fundamental right, the Court analyzed the statutes under strict scrutiny and found no compelling state interest to justify the distinction.[32] However, the Court was careful to note that not all durational residency requirements were invalid.[33]

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the planning of the welfare budget; (2) provided an objective test of residency; (3) minimized the opportunity for recipients to fraudulently receive payments from more than one jurisdiction; and (4) encouraged early entry of new residents into the labor force. *Id.* at 633-34. The Court held, respectively: (1) the records were not used to predict how many people would require aid in the budget year since the states relied on other methods to make budget estimates; (2) the residency requirement and the waiting-period requirement were determined independently, so there was no need for an additional condition; (3) there were less drastic means available to prevent fraud; and (4) if the one-year waiting period encouraged new residents to join the labor force, it would encourage long-term residents as well. *Id.* at 634-38.

[30] *Id.* at 627. The only distinction between the two classes of needy families was that one class had resided in the states for more than one year, and the other class had resided in the states for less than one year. *Id.*

[31] *Id.*

[32] *Id.* at 638. Strict scrutiny was the type of analysis employed by the Court when a classification penalized the exercise of a constitutionally protected fundamental right. *Id.* at 634. If such a penalization occurred, the state must have demonstrated that the classification was necessary to further a compelling interest in order to justify the distinction. *Id.* Since the classification in *Shapiro* penalized the fundamental right to travel, and since the state offered no interests sufficient to justify the distinction, the Court concluded that the statutes were unconstitutional. *Id.* at 634-42; *see also* United States v. Jackson, 390 U.S. 570, 581 (1968) (laws which purposely chilled assertion of constitutional rights were patently unconstitutional); *cf* Bates v. Little Rock, 361 U.S. 516, 524 (1960) (state must show compelling interest where laws encroached upon personal liberty); Korematsu v. United States, 323 U.S. 214, 216 (1944) (restrictions which curtail civil rights of single racial group were subject to most rigid scrutiny); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (application of strict scrutiny to invalidate statute denying marriage, procreation). *See generally* Note, *Resident Requirements After Shapiro v. Thompson*, 70 COLUM. L. REV. 134, 134-36 (1970) (discussion of chilling effect *Shapiro* statutes had on right to travel).

[33] *Shapiro*, 394 U.S. at 638 n.21. In *Shapiro*, the Court stated:

> We imply no view of the validity of the waiting-period *or* residency requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish and so forth. Such requirements may promote compelling interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right to travel.

After *Shapiro*, the opinion in *Dunn v. Blumstein*[34] represented the Court's first clarification of the appropriate level of scrutiny for a state durational residency requirement.[35] In *Dunn*, the State of Tennessee conditioned the right to vote on twelve-months residency in the state and three-months residency in the county wherein the resident sought to vote.[36] The Supreme Court concluded that the statutory provisions operated to penalize appellee's right to travel and violated the equal protection clause.[37] Since the challenged provisions penalized two fundamental rights, the right to vote[38] and the right to travel,[39] the

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Id. (emphasis in original).

Following the application of strict scrutiny in *Shapiro*, many federal courts invalidated state statutes which conditioned the receipt of public benefits on residency requirements. Note, *Durational Residency Requirements and the Equal Protection Clause: Zobel v. Williams*, 25 WASH. U.J. URB. & CONTEMP. L. 329, 342-45 (1983); *see, e.g.*, Beesaw v. Affleck, 333 F.Supp. 775, 781 (D.R.I. 1971) (statute which made availability of public assistance benefits contingent on one-year residency requirement held unconstitutional); Stevens v. Campbell, 332 F.Supp. 102, 107 (D. Mass. 1971) (statute which required six-month residency before becoming eligible for veteran preference employment was invalidated); Valenciano v. Bateman, 323 F.Supp. 600, 603 (D. Ariz. 1971) (statute which conditioned non-emergency medical care for indigents on one-year residency requirement held unconstitutional); Sheard v. Department of Social Welfare, 310 F.Supp. 544, 545 (N.D. Iowa 1969) (statute which conditioned old-age assistance on nine-year residency requirement invalidated).

[34] 405 U.S. 330 (1972).

[35] *Id.* at 336. *Dunn* focused on the area of voter eligibility. *Id.* In *Shapiro*, the Court clearly did not decide whether durational residency requirements could be used to determine voting eligibility. *Shapiro*, 394 U.S. at 638 n.21. *See generally The Supreme Court, 1971 Term*, 86 HARV. L. REV. 52, 104-15 (1972) (discussion of durational residency requirements for voting).

[36] TENN. CONST. art. IV, § 1; TENN. CODE ANN. §§ 2-201, 2-304 (Supp. 1970).

[37] *Dunn*, 405 U.S. at 338, 360.

[38] *Id.* at 336. The Court made it clear that the right of every citizen to vote was a constitutionally protected right. *Id.; see, e.g.*, Evans v. Cornman, 398 U.S. 419, 421-22, 426 (1970) (residents had equal opportunity to choose political representation); Kramer v. Union Free School Dist., 395 U.S. 621, 629 (1969) (strict scrutiny was necessary when some residents were allowed to vote while others were not); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966) (right to vote preserved all other fundamental political rights); Reynolds v. Sims, 377 U.S. 533, 562 (1964) (right to vote operated to preserve other basic rights). *See generally*, Note, *Durational Residence Requirements from Shapiro Through Sosna: The Right to Travel Takes a New Turn*, 50 N.Y.U. L. REV. 622, 634-36 (1975) (discussion of right to vote, right to travel under durational residency requirements).

[39] *Dunn*, 405 U.S. at 338-42. The Court stated that durational residency requirements violated the fundamental and personal right to travel. *Id* at 338.

Court determined that the appropriate standard of review was strict scrutiny.[40] The *Dunn* Court clarified *Shapiro* in that the presence of actual deterrence was deemed indeterminative of whether or not an infringement of the right to travel constituted a penalty.[41] Instead, the Court analyzed the Tennessee statute and determined that a penalty actually existed since a newcomer was denied the right to vote.[42] Any classification which penalized the right to travel had to satisfy the compelling-state-interest test.[43] Since Tennessee's asserted interests were not compelling,[44] the statutes failed to withstand constitutional scrutiny and were invalidated.[45]

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[40] *Id.* at 335.

[41] *Id.* at 339-40. Other cases have also invalidated statutes which infringed upon the right to travel even though the presence of an actual deterrence was only minimal. *See* Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 79-80 (1920) (state could not deny nonresidents small income tax exemptions even though amount was insufficient to deter travel); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 432 (1871) (Court did not consider actual deterrence of travel when it invalidated small tax on nonresident traders); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 46 (1868) (Court invalidated one dollar tax imposed on persons who left state by common carrier).

[42] *Dunn*, 405 U.S. at 340-42. The Court determined that the effect of Tennessee's requirements was not only to penalize the right to travel, but also to absolutely deny the right to vote. *Id.* at 341.

[43] *Id.* at 340-41; *see* Oregon v. Mitchell, 400 U.S. 112, 238 (1970) (Brennan, J., dissenting) (durational residency requirement for voting penalized right to travel, called for strict scrutiny).

[44] *Dunn*, 405 U.S. at 360. The state offered two objectives that were served by the residency requirements — insuring the purity of the ballot box and insuring knowledgeable voters. *Id.* at 345. The Court rejected the first asserted purpose and found that more palatable means were available to insure purity of the ballot box. *Id.* at 345-54. Included in the Court's list of less restrictive means were cross-checks for voter lists in their former jurisdictions, six sections of the Tennessee Code dealing with voter fraud, and objective information such as locus of dwelling, automobile registration, and driver's license. *Id.* at 348. *See generally* Comment, *Residence Requirements for Voting in Presidential Elections*, 37 U. CHI. L. REV. 359, 364 & n.34, 374 (1970)(explanation of how some states have allowed voting without using durational residency requirements). The Court examined the second purpose and concluded that an attempt to insure educated voters was an overbroad and unfair requirement imposed only on some citizens. *Dunn*, 405 U.S. at 359-60.

[45] *Dunn*, 405 U.S. at 360. After *Dunn* was decided by the Supreme Court in 1972, many lower courts invalidated statutes on the ground that the durational residency laws violated the right to vote. *See, e.g.*, Ferguson v. Williams, 343 F.Supp. 654, 657 (N.D. Miss. 1972) (four-month residency requirement for voting was unconstitutional); State v. Van Dort, 502 P.2d 453, 454 (Alaska 1972) (durational residency requirements held prima facie unconstitutional).

After *Shapiro* and *Dunn*, the scope of the right to travel in the context of durational residency requirements was broad and unclear.[46] However, the subsequent case of *Memorial Hospital v. Maricopa County*[47] defined and limited the right to travel analysis as applied to durational residency requirements.[48] Likewise, *Memorial Hospital* expanded the right-to-travel analysis into the field of indigent medical care.[49] In *Memorial Hospital*, an Arizona statute required that a person must have been a resident of a county for the preceding twelve months to receive non-emergency medical treatment at the county's expense.[50] The Supreme Court concluded that the statute created an invidious classification which infringed upon the right to travel and hence violated the equal protection clause.[51] While the *Memorial Hospital* Court clarified the reasoning of *Shapiro*,[52] the emphasis and characterization of the right to travel was shifted.[53] The Court declared that the right to travel was not so much a guarantee of uninhibited movement across the states, but an assurance that new residents would enjoy the same state-created benefits and privileges which were guaranteed to other residents.[54] Furthermore, *Shapiro* was refined when the Court proclaimed that the necessary degree of impact on the right to travel which required strict scrutiny review was that which operated as a pen-

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[46] *See* Comment, *A Strict Scrutiny of the Right to Travel*, 22 UCLA L. REV. 1129, 1149-52 (1975) (explanation of vagueness which scope of right to travel had after *Shapiro, Dunn*).

[47] 415 U.S. 250 (1974).

[48] *Id.* at 253-62.

[49] *See* Pellecchio, *Memorial Hospital v. Maricopa County: The Present Status of Right To Travel*, 6 COLUM. HUM. RTS. L. REV. 551, 551-52, 557-62 (1974-75) (explanation of how *Memorial Hospital* limited, expanded right to travel as waiting period for welfare benefits was abolished).

[50] *Memorial Hospital*, 415 U.S. at 252; *see also*, ARIZ. REV. STAT. ANN. § 11-291 (Supp. 1973-74) (statutory requirements for non-emergency hospital care).

[51] *Memorial Hospital*, 415 U.S. at 269.

[52] *Id.* at 255, 262. The Court in *Shapiro* was concerned only with the right to "migrate, resettle, find a new job, and start a new life . . . ." *Shapiro*, 394 U.S. at 629; *see* Cole v. Housing Auth., 435 F.2d 807, 811 (1st Cir. 1970) (interpretation of *Shapiro* which defined travel as migration with intent to settle, abide). As the Court in *Memorial Hospital* reasoned, even a bona fide residency requirement would impair the right to travel under the *Shapiro* standard. *Memorial Hospital*, 415 U.S. at 255.

[53] *Memorial Hospital*, 415 U.S. at 253-62.

[54] *Id.* at 261.

alty.[55] Once the Supreme Court found that the Arizona statute effectively penalized the right of interstate travel,[56] strict scrutiny was applied[57] and the conclusion reached was that the state had failed to demonstrate a compelling interest sufficient to justify the durational residency requirement.[58]

Just as it seemed that the Court had developed a consistent right-to-travel analysis for durational residency requirements, this area of the law was cast into a state of confusion with the holding in *Sosna v. Iowa*[59]. In *Sosna*, the plaintiff was prevented from obtaining a divorce due to Iowa's one-year durational residency statute.[60] The Court rejected the plaintiff's claim that she was denied her constitutional rights of travel, of equal protection, and of due process of law and upheld Iowa's durational residency statute.[61] In addition, the Supreme Court distinguished *Sosna* from *Shapiro*, *Dunn*, and *Memorial Hospital*.[62] The relevant distinction rested on the fact that the plaintiff was not totally denied that which she sought under the Iowa statute,

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[55] *Id.* at 258.

[56] *Id.* at 261-62. Since the Court in *Shapiro* found that denying a person the basic necessities of life was a penalty, and since welfare assistance was considered a basic necessity of life, then the denial of medical care was a penalty because it was as much a basic necessity of life to an indigent as welfare assistance. *Id.* at 259. In addition, governmental benefits which constitute a basic necessity of life have often been considered of greater significance than less essential forms of governmental benefits. *Id.; see* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (pretermination hearing was demanded when welfare was discontinued).

[57] *Memorial Hospital*, 415 U.S. at 254, 262.

[58] *Id.* at 269. The Court rejected the state's argument that the requirement was necessary to assure the solvency of the free medical care program and concluded that a state could not guard public funds by creation of an invidious distinction between classes of citizens. *Id.* at 263. In addition, the Court rejected the claim of fiscal savings derived by refusal of treatment to new residents as being illusory. *Id.* at 265. As to the interest of protecting the contributions of longtime residents, the Court found that such interest violated the equal protection clause. *Id.* at 266. Moreover, the interest in efficient administrative operations could have been served by less drastic means such as state statutes which imposed criminal penalties on one who filed false statements to insure receipt of medical benefits. *Id.* at 267-69.

[59] 419 U.S. 393 (1975); *see also* Note, *supra* note 38, at 662-67 (discussion of *Sosna*'s impact on right to travel).

[60] *Sosna*, 419 U.S. at 395; *see also* IOWA CODE §598.6 (1973) (statutory residency requirements for divorce).

[61] *Sosna*, 419 U.S. at 405-10.

[62] *Id.*

but she was merely delayed for one year.[63] Furthermore, the *Shapiro-Dunn-Memorial Hospital* line of cases invalidated durational residency statutes based on budgetary or administrative considerations, whereas Iowa's residency statute was justified on the more substantive ground of judicial economy.[64] The level of scrutiny the Court employed when it analyzed the statute in *Sosna* was somewhat unclear. [65] Noticeably absent from the *Sosna* Court's reasoning were the considerations of penalty, denial of the fundamental right to travel, and the strict scrutiny analysis found in previous cases.[66] Thus, without specifically denouncing the strict scrutiny approach developed in *Shapiro, Sosna* left uncertain what type of analysis would be utilized in future right-to-travel cases.[67]

After *Sosna*, in *Zobel v. Williams*,[68] the Court's attention

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[63] *Id.* at 406. If this distinction had been drawn in *Shapiro, Dunn*, and *Memorial Hospital*, then a different result would have been reached. *See* Note, *supra* note 38, at 664 (Court discussed effect of distinction drawn in *Sosna*). The deprived parties in those cases would have eventually obtained the benefits they sought as well. *Id.* Thus, under the *Sosna* reasoning, the injured parties in those cases were merely delayed from obtaining their benefits rather than denied. *Id.*

[64] *Sosna*, 419 U.S. at 406. The plaintiffs in the previously addressed cases were totally denied their rights. *Id.* The Court determined that although durational residency statutes were not justified based solely on administrative or budgetary considerations, the Iowa statute was justified since it prevented collateral attacks to the state's divorce decrees. *Id.* at 407-09. Likewise, the state had a valid interest when it required those who sought a divorce from its courts to have been sincerely attached to the state. *Id.*at 407.

[65] *Id.* at 406-09. The Court never actually stated which of the two types of equal protection balancing tests it applied — rational basis or strict scrutiny. *Id.* In fact, it seemed that the Court struck the middle ground when it evaluated the state's purposes and weighed them against the inconvenience that the statute placed on the plaintiff. *Id.*

[66] *Id.; see supra* notes 29-33, 36-45, 50-56 and accompanying text.

[67] *See* Note, *supra* note 38, at 666-67 (explanation of uncertainties created by *Sosna*).

[68] 457 U.S. 55 (1982). Although the Supreme Court did not decide any major durational residency requirement cases between *Sosna* and *Zobel*, the Court reaffirmed the position on state discriminatory measures against persons based solely on their nonresidence or citizenship in the state. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976) (regulation which barred noncitizens' civil service employment was unconstitutional); Austin v. New Hampshire, 420 U.S. 656, 665 (1975) (tax imposed only on nonresidents was unconstitutional). *But see* Cabell v. Chavez-Solido, 454 U.S. 432, 444-47 (1982) (constitutional to require peace officers to be United States citizens); Califano v. Torres, 435 U.S. 1, 4-5 (1978) (constitutional to withdraw social security benefits from person who left United States).

turned to a different type of durational residency requirement.[69] Those requirements were labeled fixed-date residency requirements.[70] In *Zobel*, the plaintiffs attacked an Alaska statute which distributed part of Alaska's surplus revenues to the state's residents according to their length of residency.[71] Although minimal consideration was given to the right to travel,[72] the Supreme Court concluded that the statute violated the guarantees of the equal protection clause of the fourteenth amendment.[73] The Court distinguished the fixed-date residency statute in *Zobel* from the durational residency statutes.[74] The durational statutes required newly arrived residents to live in the state for a certain period of time to be eligible for benefits,[75] whereas the Alaska statute created fixed, permanent distinctions based on how long the residents had lived in the state.[76] With the distinction clearly stated, the *Zobel* Court announced that the fixed-date residency statute was subject to rational basis scrutiny under the equal protection clause.[77] The Court's statement eluci-

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[69] *Zobel*, 457 U.S. at 58-59.

[70] *Id. See generally* Note, *Constitutional Law - Right to Travel - Validity of Alaska's Income Distribution Plan*, 50 TENN. L. REV. 537, 545-59 (1983) (explanation of how *Zobel* started new line of cases); Comment, *Splitting Up Alaska's Oil Wealth Pie: The Constitutionality of Accumulative Residency Requirements After Zobel v. Williams*, 12 U.C.L.A. - ALASKA L. REV. 119, 127 (1982-83) (distinction between two types of residency requirements explained).

[71] *Zobel*, 457 U.S. at 57; *see, e.g.*, ALASKA STAT. ANN. §43.23.010 (Supp. 1981) (definition of necessary requirements to qualify for receipt of surplus revenues).

[72] *Zobel*, 457 U.S. at 60 n.6. In explaining why the right-to-travel was not included in the analysis, the Court stated that the right to travel analysis was nothing more than a type of equal protection analysis. *Id.*

[73] *Id.* at 65. The State of Alaska offered three justifications for the statute: (1) to create an incentive for people to move to Alaska and maintain residency; (2) to ensure careful management of their fund; and (3) to reward residents for past contributions.*Id.* at 61. The Court rejected the first two as not being rationally related to the distinctions Alaska made between its residents. *Id.* Furthermore, the Court concluded that the third objective was not a legitimate state purpose. *Id.; cf.* Vlandis v. Kline, 412 U.S. 441, 449-50 & 50 n.6 (1973) (apportionment of tuition rates on basis of old/new residency violated equal protection clause).

[74] *Zobel*, 457 U.S. at 58-59.

[75] *Id.; see supra* notes 27, 36, 49, 58 and accompanying text. (*Shapiro, Dunn, Memorial Hospital,* and *Sosna* durational residency statutes).

[76] *Zobel*, 457 U.S. at 58-59.

[77] *Id.* at 60-61. Generally, a law would survive rational basis scrutiny if the distinction the law created was necessary to further a legitimate state purpose. *Id.* at 60. The Court offered no explanation of why rational basis scrutiny was proper; however, the

dated the confusion created by *Sosna*.[78] Even though the statute was analyzed under rational basis scrutiny, the Court determined that the Alaska scheme was unconstitutional since the distinction created by the statute was not rationally related to the asserted interests.[79] Three years after *Zobel*, the Supreme Court decided *Hooper v. Bernallilo County Assessor*.[80] In *Hooper*, a New Mexico statute granted annual property tax exemptions to Vietnam veterans based on a fixed-date residency requirement.[81] The Supreme Court, based on strikingly similar reasoning as that in *Zobel*,[82] concluded that the statute was unconstitutional.[83] The Court distinguished *Hooper* from the *Shapiro-Dunn-Memorial Hospital-Sosna* line of cases concerning durational residency requirements and analyzed the statute under rational basis scrutiny of the equal protection clause.[84]

Court did indicate that strict scrutiny was not totally abandoned when it stated that there was no need to analyze the statute under strict scrutiny if the statute failed to withstand rational basis review. *Id.* at 60-61.

[78] *Id.; see supra* notes 60-64 and accompanying text.

[79] *Zobel*, 457 U.S. at 65.

[80] 105 S.Ct. 2862 (1985).

[81] *Id.* at 2864; *see also* N.M. STAT. ANN. § 7-37-5 (1983)(qualifications for exemption defined). Persons who qualified for the tax exemption were those honorably discharged Vietnam veterans who served on active duty during the Vietnam War for at least 90 continuous days, who were residents of New Mexico before May 8, 1976, and who were residents of New Mexico when they filed for the tax exemption. *Hooper*, 105 S. Ct. at 2864.

[82] *See* Comment, *Hooper v. Bernallilo County Assessor: Equal Protection in State Taxation*, 31 S.D.L. REV. 235, 241-44 (1985)(explanation of similarities between reasoning employed in *Zobel*, *Hooper*).

[83] *Hooper*, 106 S.Ct. at 2869. New Mexico offered two justifications for the distinctions — encouragement for Vietnam veterans to move to New Mexico and reward for veterans who resided in the state before the given date for their military service. *Id.* at 2867. The Court determined that the legislative purpose which compensated veterans for their past contributions was a plainly legitimate longstanding policy of our country. *Id.; see* Regan v. Taxation with Representation, 461 U.S. 540, 551 (1983)(compensation of veterans has always been deemed to be legitimate policy); Personal Adm'r v. Fenney, 442 U.S. 256, 279 (1979)(compensation provided to veterans served legitimate legislative policy). Even though the state had a legitimate purpose for the distinction between resident veterans, the Court invalidated the statute since the distinction was not rationally related to the purpose. *Hooper*, 105 S.Ct. at 2868.

[84] *Hooper*, 105 S.Ct. at 2866. The Court distinguished the New Mexico statute from the durational residency requirements since the New Mexico statute created fixed, permanent distinctions between residents based solely on when they arrived in the state. *Id.* As in *Zobel*, the Court determined there was no need to analyze the statute under strict scrutiny since it did not pass rational basis scrutiny. *Id.*

The rational basis scrutiny was the same[85] as that utilized by the Court in *Zobel*.[86] Furthermore, the *Hooper* Court relied on the holding in *Zobel* to invalidate the statute based on the equal protection clause,[86] and the Court again discussed the right to travel only in a footnote.[87]

In the instant case, the Supreme Court clearly established that the right to travel was a constitutionally protected fundamental right.[88] The Court stated that in the event a law operated to penalize individuals who have exercised their right to travel,[89] strict equal protection scrutiny was necessary.[90] Therefore, as the New York law clearly operated to penalize the plaintiffs who had exercised their right to travel,[91] strict scrutiny was appropriate.[92] Thus, New York had to demonstrate that the classification created by the law was necessary to achieve a compelling state interest.[93] The Court analyzed the four interests of-

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[85] *Zobel*, 457 U.S. at 59.

[86] *Hooper*, 105 S.Ct. at 2869.

[87] *Id.* at 2866 n.6. The Court, as it followed *Zobel*, determined that an equal protection analysis incorporated the right to travel. *Id.*

Several lower courts have relied on *Hooper* in equal protection cases. *See, e.g.*, Horton v. Marshall Pub. Schools, 769 F.2d 1323, 1331 (8th Cir. 1985)(*Hooper* cited for rational basis test); Lee v. Commissioner of Revenue, 481 N.E.2d 183, 188 (Mass. 1985)(*Hooper* cited to distinguish between permanent, temporary classifications of citizens).

[88] *Soto-Lopez*, 106 S.Ct. at 2320. Once again, the Court did not feel compelled to locate the source of the right to travel in the Constitution. *Id.* However, the Court did state that the right was most forceful in the context of equal protection analysis. *Id.* at 2320 n.2.

[89] *Id.* at 2322.

[90] *Id.* at 2321.

[91] *Id.* at 2323-24. Defendants were denied substantial benefits that were granted to other veterans similarly situated except for the residency distinction. *Id.* Moreover, defendants were permanently deprived of those benefits; they could not change their status. *Id.* at 2324.

[92] *Id.* at 2321. The Court reasoned that since the New York statute created different classes of residents, and since the creation of different classes of residents gave rise to equal protection concerns, then the equal protection clause would be relied upon in addition to the right to travel. *Id.* However, the standard of review was the same regardless of which label — right to migrate or equal protection — was placed on the analysis." *Id.* at 2322 n.4.

[93] *Id.* at 2322. The Court rejected the rational basis sequence of analysis employed in *Zobel* and *Hooper* and concluded that the better approach was to first determine the appropriate level of review and then apply it. *Id.* at 2323 n.6.

fered by the state as compelling[94] and concluded that such interests were not sufficient to justify the infringement on the right to travel.[95] Hence, New York's veterans' preference law violated the plaintiff's constitutionally protected rights to migrate and to equal protection of the law.[96]

In a strongly worded dissent,[97] Justice O'Conner found the application of strict scrutiny under the equal protection clause inappropriate as the New York law did not penalize the right to travel.[98] Justice O'Conner discarded the law as penalizing the right to travel since the law did not subject the plaintiffs to a deprivation of fundamental rights or essential governmental services.[99] Moreover, Justice O'Conner reasoned that the New York law did not penalize the plaintiffs from the standpoint of depriving them of participating in a significant activity, as public employment is not considered a fundamental right.[100] Furthermore, Justice O'Conner stated that in no sense were newcomers forced to accept an inferior status when compared to most New York

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[94] *Id.* at 2324-25. New York offered four interests to justify the requirement: (1) to encourage residents to join the armed forces; (2) to compensate residents for their service in a time of war; (3) to induce veterans to return to New York after service; and (4) to employ public servants with useful military experience. *Id.* at 2324. The Court held that all four justifications failed strict scrutiny because a more narrow means would yield a lesser burden on the constitutionally protected activity and would accomplish the same stated interests. *Id.* at 2324-25.

[95] *Id.* at 2324-25.

[96] *Id.* at 2325. The Court expressly overruled August v. Bronstein, 417 U.S. 901 (1974). *Id.* at 2326 n.9. In *August*, the Court summarily affirmed the lower court's decision which upheld the same New York statute as that involved in *Soto-Lopez*. August v. Bronstein, 369 F. Supp. 190, 195 (S.D.N.Y. 1974), *summarily aff'd*, 417 U.S. 901 (1974).

Chief Justice Berger filed a separate opinion, concurring in the judgment, but reaching his conclusion by slightly different reasoning. *Soto-Lopez*, 106 S.Ct., at 2326 (Burger, C.J., concurring). He reasoned that the New York law should have been analyzed first under the rational basis analysis of the equal protection clause. *Id.* If the law survived that level of scrutiny, then, if appropriate, the law should be analyzed under the higher level of scrutiny. *Id.* Nevertheless, he concluded that the statute failed even under rational basis scrutiny. *Id.* Justice White also filed a separate opinion, concurring in the judgment and concurring in the reasoning of Chief Justice Burger. *Id.* at 2328 (White, J., concurring).

[97] *Id.* at 2328 (O'Connor, J., dissenting).

[98] *Id.* at 2332. Justice O'Connor designated the privileges and immunities clause as the source of the right to travel. *Id.* at 2330.

[99] *Id.*

[100] *Id.*

residents.[101] Once the appropriateness of strict scrutiny analysis was denounced, Justice O'Conner concluded that the legitimate state purpose of awarding veterans for their past contributions[102] clearly withstood rational basis scrutiny and hence was to be upheld.[103]

While the previous right-to-travel cases concerning residency requirements were indecisive as to the appropriate level of scrutiny to be applied by the Supreme Court,[104] the instant case establishes a more stable method of analysis to be employed in future right-to-travel cases.[105] *Soto-Lopez* represents a retreat from the rational basis review applied in *Zobel* and *Hooper*[106] and reinstates the strict scrutiny analysis developed in *Shapiro*, *Dunn*, and *Memorial Hospital*.[107] Hence, *Soto-Lopez* mandates that in the future when a statute operates to penalize the right to travel, either by durational or fixed-date residency requirements, the statute must be narrowly tailored so as to advance a compelling state interest before the infringement of the right to travel will be justified.[108] Although *Soto-Lopez* reflects an effort to define the proper right-to-travel analysis, the Court fails to provide specific guidelines for determining what constitutes a penalization of that right.[109] Since strict scrutiny will apply only when a law operates to penalize the right to travel,[110] the Supreme Court should make an increased effort in future cases to effectively define what a penalization of the right entails. Despite this one shortcoming, *Soto-Lopez* will stabilize the previously inconsistent analysis utilized in right-to-travel cases.[111] The inconsistencies will be curtailed in that any statute which

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[101] *Id.* Defendants and other veterans in the same position were treated exactly the same as a large majority of New York citizens since prior residency was only one of a number of preconditions necessary to satisfy the veterans' preference scheme. *Id.*

[102] *Id.* at 2332-33.

[103] *Id.*

[104] *See supra* notes 32, 43, 53, 62, 72, 79 and accompanying text.

[105] *See supra* notes 83-89 and accompanying text.

[106] *See supra* notes 72, 79 and accompanying text.

[107] *See supra* notes 32, 43, 53 and accompanying text.

[108] *See supra* notes 83-89 and accompanying text.

[109] *See supra* notes 83-89 and accompanying text.

[110] *See supra* note 53 and accompanying text.

[111] *See supra* notes 32, 43, 53 and accompanying text.

penalizes the right to travel will automatically be subjected to strict equal protection scrutiny.[112] Thus, a statute which infringes upon the right to travel will most likely be invalidated under harsh strict scrutiny review.

Stuart G. Kruger

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[112] *See supra* notes 83-89 and accompanying text.

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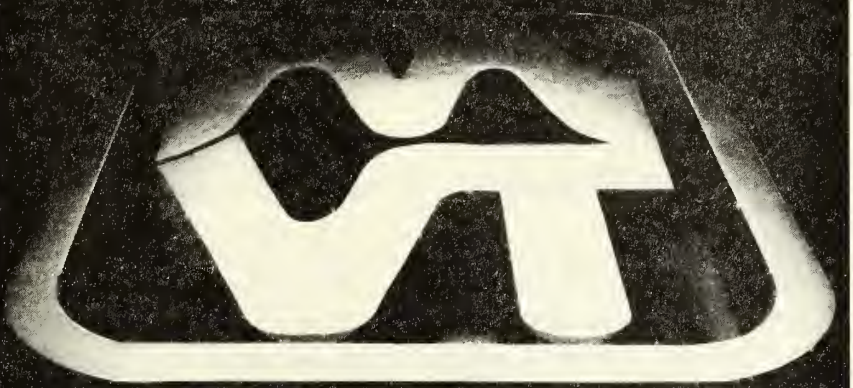

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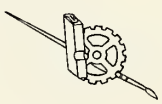

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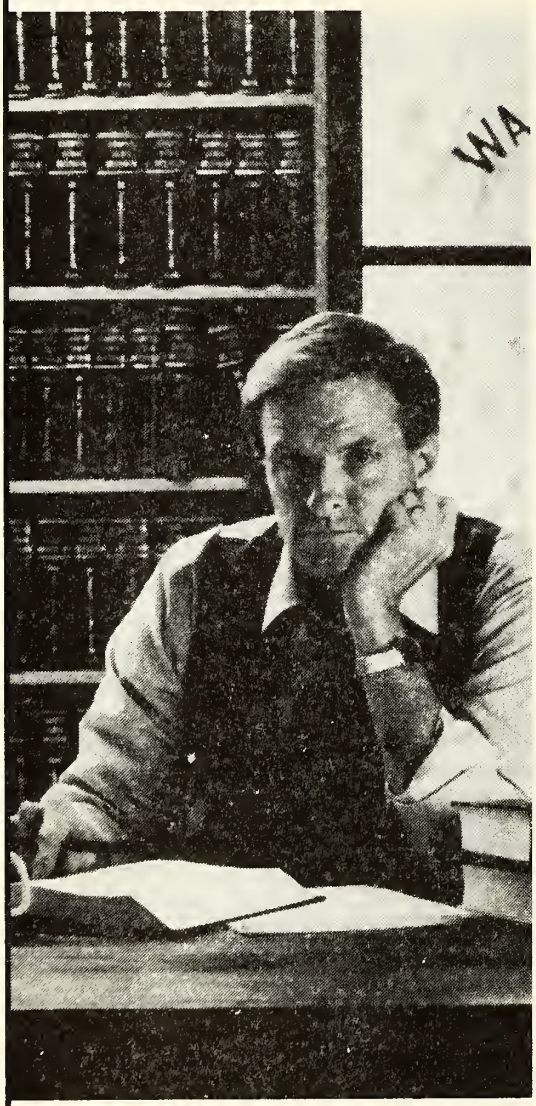

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